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MARK KRASNICK, Research Coordinator

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Case Studies in the Division of Powers





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Case Studies in the Division of Powers

This is Volume 62 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.

The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.



Case Studies in the Division of Powers

MARK KRASNICK
Research Coordinator

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FOREWORD *ix*

INTRODUCTION *xi*

PREFACE *xv*

1. **Constitutional Aspects of External Trade Policy** *1*

H. Scott Fairley

Introduction *1*

Federal Governance and Jurisdictional Limitation *2*

Peace, Order and Good Government and International
Good Faith *3*

Regulation of Trade and Commerce *7*

Provincial Powers and the Internal Dimension of External Trade
Relations: POGG in the Province *18*

Legislative Powers *19*

Governments as Participants in the World Market *22*

Alternative Methodologies *30*

Risk Taking *30*

Cooperative Federalism *31*

Institutionalizing Cooperation for Specific Tasks *32*

Constitutional Amendment *34*

Concluding Observations *35*

Notes *37*

2. **Energy and Natural Resources:**

The Canadian Constitutional Framework *53*

Nigel D. Bankes, Constance D. Hunt, and J. Owen Saunders

Introduction *53*

Division of Powers	54
Introduction	54
Ownership of Resources	58
Exploration, Development, and Production of Resources	67
Marketing and Transportation	69
Fiscal Controls Over Resources	71
Water and Other Environmental Matters	76
Techniques for Coping with Constitutional Rigidities	80
Introduction	80
Federal-Provincial and Interprovincial Agreements	81
Constitutional Limitations on Federal-Provincial Agreements	92
Vacating the Field and Unexercised Federal Power	97
Exercise of Proprietary Rights	101
Public Corporations	105
Commissions of Inquiry	111
The Use of Reference Cases	116
Conclusions	121
Appendix A	124
Notes	126

3. **Transportation and Communications:**

The Constitution and the Canadian Economic Union	139
<i>Charles M. Dalfen and Laurence J.E. Dunbar</i>	
Introduction	139
The Federal and Provincial Domains	140
The Constitutional Framework	140
The Regulatory Framework	151
Conclusions	162
The Canadian Economic Union	164
Economic Union	164
The Transportation and Communications Sectors	165
The Requirements of Transportation and Communications in Nation Building	180
→ Constitutional or Statutory Change	183
Transportation	183
Communications	184
→ Delegation	190
Conclusions and Recommendations	192
Notes	195

4. **Fisheries, Harmonization and the Economic Union** 203

Bruce H. Wildsmith

Fisheries: Functional Components and Constitutional Connections	203
Introduction	203

Harvesting	204
Processing	205
Marketing	206
Aquaculture	207
The Fisheries Power	207
Fisheries in Other Economic Unions	214
Australia	214
United States	219
European Economic Community	225
The Canadian Debate	229
What the Provinces Want	229
The Federal Response	237
Other Statements on Fisheries Jurisdiction	243
Harmonization of Fisheries Policy: The Foundations	246
A New Alignment	249
Inland Fisheries	251
Marine and Aquatic Plants	252
Sedentary Species	252
Aquaculture	253
Seacoast Fisheries	253
A Native Fishery	256
Possible Economic Consequences	257
Atlantic Salmon: An Illustration	259
Implementation	261
Notes	263
Bibliography	265
ABOUT THE CONTRIBUTORS	269



When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD



At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH



The Commission's series of research studies on the Canadian Economic Union and Federalism, of which the present volume is a part, brings together research in the disciplines of economics, law and political science to address a question that has often been asked in the history of this country: have we the right balance between the local and national orders of government? The more one researches the history, the more one tends to believe that the designers of the first Constitutional Accord in 1867 were prepared to leave that question to a later generation, as were the courts in the decades that followed. Throughout the Federalism volumes, we have looked at the pressures, the institutions, the funding and the management of our economic federation. Whether we have contributed anything toward the answer to that perennial question will be for the reader to judge.

In the Overview published in the series along with this volume, we have made much of the interdependence between orders of government. The period from 1968 to the present has seen a preoccupation with the division of powers in the context of constitutional change, and while the amendments of 1981 were more of an amplification than a wholesale restructuring, the concern for the appropriate jurisdictional balance between orders of government remains.

The papers in this volume focus on four areas that have been the subject of constitutional examination — either formally as part of the attempt to arrive at a new division of powers, or *de facto* as provinces moved more directly into areas that were traditionally viewed as having been the exclusive responsibility of the federal government.

The first area is that of external affairs, where the absence of a treaty power in the Constitution, and the continued controversy over the

Labour Conventions case (now almost fifty years old) highlight one side of the complexity that now surrounds external affairs. The growing realization of the importance of trade policy for our economic well-being and the levers currently exercised by both orders of government in support of and in opposition to freer trade make this a timely subject for re-examination.

The second area examined is that of energy and natural resources — a field of concern, of conflict and of experimentation and innovation. The second paper in the volume examines those disputes engendered by court interpretations and those caused by the fallout from energy shocks through to the constitutional amendment agreed to as part of the 1981 Accord. Reviewing the Nova Scotia–Canada agreement and the provincial use of the spending power by Alberta to fund petroleum incentive grants, the paper looks at how the Constitution must be used to its fullest to create the climate necessary for development when the financial cost is so great that any additional risks from jurisdictional wrangles can make the costs prohibitive. As well, this second paper includes a short examination of the evolving area of water policy and indicates how the lack of constitutional clarity in this matter will be troubling in the future. It looks at other non-contractual devices that are employed when the division of powers leads to a jurisdictional roadblock to government action.

The authors of the third paper, on transportation and communications, believe that Canada must see to it that the communications infrastructure progresses in this century as did the transportation infrastructure in the last. The reason for this is the federal responsibility for the protection of the economic union's goal of the free flow of goods and services, seen in the present context as uniform national administration and regulation of the communications network. The need to enhance and protect this economic union, to make national decisions quickly and to ensure that the benefits of competition are realized throughout the nation make it imperative that a national leadership role be undertaken.

Interdependence is also demonstrated by the way in which the fisheries have been historically administered, as examined in the final paper in this volume. From the mid 1920s, in all provinces west of Quebec, administration of the inland fishery has been delegated to the provinces. As well, the relationship between place, prosperity and the fishery, so real in Atlantic Canada, has made the interrelationship a crucial variable as well. Here the result is a plea for more structured interdependence and a straightening out of federal and provincial roles.

It is our hope that the next round of constitutional discussions benefit from the papers contained in this volume along with those in the volume *Division of Powers and Public Policy* (volume 61) and the monograph by Thomas J. Courchene (volume 67, *Economic Management and the Divi-*

sion of Powers). There are some new arguments and some new characterizations. There are as well practical suggestions for progress without constitutional reform and a belief by many of the authors that it is this approach that is most likely to be of real benefit.

MARK KRASNICK



Constitutional Aspects of External Trade Policy

H. SCOTT FAIRLEY

Introduction

The notion of Canada as an economic union within a single nationstate contrasts sharply with the principle of divided sovereignty that sustains the political character of the Canadian federal state. Consequently, our Constitution mandates a delicate balance between external and internal points of view, each capable of undermining, if not eclipsing, the other.¹ This paper responds to a perception that this balance in the field of international trade is upset in that the national direction of Canada's external trade relations has been seriously compromised, in part by constitutional constraints embodying the internal point of view.²

My approach is twofold. The preliminary question for the constitutional lawyer should be whether the rules of limitation imposed by the constitutional division of powers support or discount the governing perception. If the problem lies elsewhere, so should the solution.³ Where, however, issues are peculiarly constitutional in character, the possible forms of treatment, short of starting afresh, are limited by the flexibility of interpretation left in the original design: far from immutable, yet, given its purpose, not lightly forsaken.

Constitutions supply fundamental rules of limitation for a generally permanent but evolving vision of the polity. The vision is maintained, by necessity, through an impartial third-party resolution of disputes concerning the actions of governments that are alleged to have exceeded the limits of the Constitution, either as between the governments themselves or as against the people.⁴ Only one kind of scrutiny — the familiar ground of *ultra vires* — concerns us here. Division of powers analysis addresses only the constitutional means of attaining the ends of government in a federal state, not the ends themselves. The latter are remitted to the legislative process, which pursues politically determined policy

objectives at a particular point in time. The policies come and go with the needs of the day, but the basic constitutional principles are meant to endure. Of course, even without the radical surgery of constitutional amendment, these principles do evolve through the force of judicial interpretation, which is compelled to fill in or go beyond the commands of the framers and through the informal usages and understandings of government actors functioning in the absence of judicial pronouncements.⁵ Yet, ultimately, and in lieu of amendment, all patterns of evolution must nevertheless respect the integrity of the original constitutional structure or be liable to correction.

What then do we seek from an appraisal of the constitutional aspects of an external trade policy for Canada? It should provide an analysis that explains the limits to, and spheres of, governmental power in the Canadian federal state on which the formulation and implementation of an external trade policy depend. The analysis will say nothing about the substantive content of the policy, only the means — or absence thereof — for securing the policy goal. First, however, there must be an existing or assumed policy on external trade relations and priorities to focus an inquiry which does not in itself provide one. What is the end in view?

I will assume a federal policy preference for a single, coherent external trade policy, national in scope and directed toward enhancing the Canadian Economic Union as a whole.⁶ This preference further commends strong central direction and control, indicating a preference for federal competence in the field. A centralist preference is the threshold position which, I will further assume, conventional wisdom dismisses as untenable. Portions of this analysis argue that conventional wisdom overstates the constitutional status quo in opposition to the assumed objective. Where those arguments appear to succeed, however, I consider alternative means of accommodation, mediation and initiation, which, one hopes, will avoid doing violence to the basic character of the Canadian federal state.

The body of the paper comprises three main subdivisions. The following section covers key federal powers, primarily in the context of formal trade relations with foreign nations and the domestic rationalization of external trade policy. The subsequent section takes a similar approach with respect to the exercise of provincial powers. Here, however, the emphasis is on the extent to which constitutionally mandated elements of local autonomy may undercut the maintenance and control of national policies on foreign trade. The final main section of the paper then builds on the results of the previous two and suggests a number of approaches to the end in view. A summary of observations concludes the analysis.

Federal Governance and Jurisdictional Limitation

In principle, external trade policy appears to be a primarily federal

constitutional mandate. The conduct of external affairs per se falls exclusively within the sphere of the Royal Prerogative in virtue of "a Constitution similar in principle to that of the United Kingdom" and Canada's accession to international status.⁷ At no time has this power been exercised formally in the sense of creating relationships subject to international law other than by the federal executive, even though the plenary competence of Parliament to implement legal undertakings to foreign governments (s. 132) lapsed once the Empire bestowed international personality on the Dominion. Still, one would think that exclusive legislative competence with respect to trade and commerce (s. 91(2)), customs and excise (s. 122), monetary policy (s. 91(14) to (21)), and national transportation systems (s. 92(10)(a), (b)) — not to mention the declaratory power (s. 92(10)(c)), virtually unlimited taxing powers (s. 92(3)), residual competence "to make Laws for the Peace, Order, and good Government of Canada" (POGG),⁸ and the guarantee of an economic union (s. 121) — would be more than adequate to tackle the subject at hand. Yet, the perception is otherwise.

The following analysis concentrates on two major areas in which deficiencies are alleged to occur in the constitutional mandate affecting the central management and control of external trade policy: the incompleteness of the external affairs power in terms of putting the results of international negotiation into effect; and the limits on federal ability to regulate as necessary the full spectrum of economic activity related to Canadian trade in foreign markets. Limitations to federal power under each category arose by virtue of judicial notions of the Canadian federal state received from the law Lords sitting on the Privy Council; even though many of these concepts were not the products of Canadian thought or experience, they have become part of it.⁹ Short of constitutional amendment, the limitations of history and precedent tend to stay with us;¹⁰ little is gained simply by concluding that they should go away. These limits can, however, evolve and expand up to and perhaps beyond the confines of their original conception,¹¹ especially where the continuing logic of previously imposed limitations leaves much to be desired.

Accordingly, it seems worthwhile to reassess these limits in the light of the most recent refinements from Canadian courts; first, for establishing the extent to which the apparent constitutional deficiencies remain valid; second, to ask what may be done consistent with the Constitution we now have, for the problems that persist.

Peace, Order and Good Government and International Good Faith

Increasingly in an interdependent world, domestic policies on external trade are a product of international negotiation and agreement. Since the Canadian economy depends heavily on access to foreign markets, we

are compelled to remain a vigorous good-faith participant in fashioning the rules of the international marketplace. Should it not follow that our growing reliance on such international mechanisms as the Auto Pact¹² with the United States or the General Agreement on Tariffs and Trade (GATT)¹³ suggests a basis for national regulatory initiatives in keeping with the assumption of rights and duties under the law of nations? The short answer to that question for Canada is a rather troublesome negative or, at best, a problematic maybe.

Section 132 of the *Constitution Act, 1867* did not survive Canada's evolution from colony to fully sovereign status in the international community.¹⁴ Notwithstanding initial signs from the Privy Council that the federal residual power might have filled the gap left by the eclipse of this section, which contemplated exclusive parliamentary implementation of imperial treaties,¹⁵ Lord Atkin put the issue to an uneasy rest in the *Labour Conventions* case.¹⁶ In a reversal of the decision of an evenly split Supreme Court of Canada¹⁷ which sustained federal legislation otherwise trenching on the provincial sphere, the Privy Council ruled that:

[f]or the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. . . .¹⁸

Lord Atkin's reasoning that, "while the ship of state sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure,"¹⁹ conveyed a somewhat stilted view of a supposedly organic document and, from that perspective, remains the hallmark of literalism in our constitutional history.²⁰ As such, it has been roundly condemned by the majority of Canadian academics²¹ and even disowned by one of the participating judges, who was not permitted the luxury of a dissenting opinion.²² Judicial flirtation with the prospect of overruling *Labour Conventions*, arises from time to time, yet has always stopped short of the mark.

Chief Justice Kerwin first suggested the possibility of reconsidering the Privy Council's views in deciding *Francis v. The Queen*.²³ More forcefully in the *Off-Shore Mineral Rights* decision of 1967,²⁴ the Supreme Court of Canada intimated that the existence of international responsibility enhanced Ottawa's claim of federal proprietary rights and regulatory jurisdiction over both the territorial sea and the continental shelf.²⁵ Nevertheless, it could be said that the decision turned on a narrower ground: when British Columbia entered Confederation, contemporary English authority²⁶ suggested that the boundaries of the province ended at the low-water mark and, therefore, could not embrace any of the offshore areas under dispute. Thus, the idea that the 1967 decision might have constituted an impartial overruling of *Labour Con-*

ventions seemed anomalous at the time.²⁷ A decade later, Chief Justice Laskin also discussed the possibility of dispensing with Lord Atkin's dictum in *MacDonald v. Vapor Canada*; but again, the core issue was avoided when the court ruled that the challenged federal enactment was not in fact legislation implementing a treaty.²⁸

More recently, a far-reaching decision of the High Court of Australia sustained direct federal intervention pursuant to a UNESCO treaty for the international protection of the natural heritage of mankind, notwithstanding direct conflict with subject-matter jurisdiction assigned to the states.²⁹ The case attracted favourable notice from federal authorities in Canada; nevertheless, it still appears that there are no current plans for a direct assault on Lord Atkin's legacy.³⁰

The latest pronouncement by the Supreme Court of Canada on the ongoing federal-provincial wrangle over offshore marine resources³¹ may prolong the debate even further. There, in a single opinion, the Court upheld federal regulatory jurisdiction over the Newfoundland continental shelf as an incident of POGG. As in 1967, much emphasis was placed upon the dependence of a coastal state's offshore proprietary and regulatory interests on the controlling principles of international law.³² Again, however, Newfoundland's claim of legislative jurisdiction failed because such jurisdiction is confined constitutionally to operation "in the Province."³³ Provincial incapacity to legislate extraterritorially, coupled with the recognition of limited rights of ownership devolving to Canada by virtue of international law, simply meant that "jurisdiction falls to Canada under the peace, order and good government power in its residual capacity,"³⁴ not that federal authority could prevail over an otherwise properly constituted provincial jurisdiction.

The federal reference cleverly avoided the thornier issue of jurisdiction over the territorial sea, which the Newfoundland Court of Appeal had awarded to the province, prior to the Supreme Court ruling, pursuant to a more broadly phrased reference brought by the Peckford government.³⁵ The harder question will be faced squarely if the appeal from the *Newfoundland Reference* ever goes ahead.³⁶ In other respects, the results of the two references remain free of contradiction. On the continental shelf issue, the Newfoundland court also ruled in favour of the federal position.

In the meantime, the likelihood of sustaining domestic implementation of international instruments under POGG would appear to be confined to the same criteria governing its application in purely internal matters. Only with extreme difficulty could one envisage relying on the "emergency" doctrine³⁷ in matters of external trade, especially given the temporary nature of the legislative competence that is conferred by this approach to residual federal jurisdiction. Such an approach hardly suggests a secure mandate for international undertakings in areas otherwise removed from, or only tentatively within, federal reach.

We are therefore left with the other branch of POGG, the "national

dimensions” test.³⁸ This argument would posit, following Professor La Forest, that “the federal parliament may legislate [in respect of treaty obligations] regarding those matters beyond the interest of any one province.”³⁹ The main problem here is that, as the test is currently phrased, external trade policy issues, taken together as a general subject matter, lack the novelty and discreteness of such precedents as aeronautics,⁴⁰ atomic energy⁴¹ or narcotics control.⁴² Rather, pursuant to the analysis of Justice Beetz in the *Anti-Inflation* case, the implementation of external trade policies pursuant to a treaty probably “[would] not pass muster as a new subject matter.” On the contrary, it embraces “an aggregate of several subjects some of which [may] form a substantial part of provincial jurisdiction.”⁴³

Another serious difficulty of a national dimensions approach is the fact that international trade was clearly within the contemplation of the founding fathers,⁴⁴ even though the judicially limited scope of the jurisdiction conferred might not have been: wishing simply to assume more far-ranging international obligations in the modern era hardly qualifies for breaking new constitutional ground. Nevertheless, such a desire on the part of federal authorities might possibly be justified under a national dimensions argument, in narrow circumstances that are capable of containment.

The argument commences by recalling Lord Watson’s thoughtful prediction that “some matters in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion.”⁴⁵ Is it overly facile to conjecture that certain external trade policies impinging on existing provincial fields could and do possess that potential? Contractual relations formed in a province, but as part of an international commercial transaction, provide one possible example.⁴⁶ If we appreciate that certain matters under the national dimensions doctrine — like the subject of narcotics — can subsequently prove to be less discrete and insular than originally thought,⁴⁷ and yet remain valid subjects of ongoing federal jurisdiction, then why not allow equally that novelty and discreteness can arise, suitably confined, out of a known field? Quite a slalom? Perhaps; yet such an analysis could apply safely removed from the precipice of a slippery slope, to a unitary state.

The foregoing adaptation of the national dimensions test falls far short of a general writ for federal policy-makers.⁴⁸ At best, the mandate for external trade policies in conjunction with international undertakings would allow only for carefully considered piecemeal forays, in each case accompanied by some risk that the experiment might not pass judicial scrutiny unscathed. Nevertheless, that risk lies everywhere if the courts are doing their job. Inconvenience and an atmosphere of tentativeness alone do not erect a constitutional bar. Rather, such an argument more readily suggests excuses of legal impossibility for some other reason best known to the government of the day.

As for the bar of *Labour Conventions*, the skeleton, if not the entire carcass, continues to endure, remarkably resistant to the ravages of time. For all that Lord Atkin may have ossified a limb of our “living tree,”⁴⁹ much to the consternation of liberal constructionists, it is not such a bad decision to live with.⁵⁰ Under principled as well as literal arguments, moreover:

[i]t would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation. . . .⁵¹

Clearly, a stronger justification is required. But then again, as I have argued, the present Constitution may supply a greater part of that justification than is commonly supposed.

Regulation of Trade and Commerce

The facially expansive constitutional grant to Parliament of jurisdiction over the “regulation of trade and commerce” never really existed in practice. Judicial preoccupation with notions of symmetrical federalism, in preference to enhancing the efficacy of the national will, suggested a perhaps narrower view than the founding fathers originally had in mind.

In the result, Sir Montague Smith postulated that the mutually modified⁵² scope of s. 91(2) “would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion.”⁵³ The case did not require setting any limits to these speculative categories of federal subject matter and, in appropriately judicial fashion, the Privy Council declined that honour. Indeed, it can be argued that the absolute limits of constitutionality must remain objectively unascertainable in an organic document that we wish to keep vital for future generations.⁵⁴ Such a problematic response appeals to lawyers but falls short of the mark for government actors who must always consider whether the anticipated reach of a policy exceeds their grasp.

Federal competence to control the flow of foreign and interprovincial trade seems non-controversial, if a trifle open-ended, while the second branch of the *Parsons* test remained quite obscure until the 1983–84 Supreme Court Term. What has proved more consequential, however, is the legacy of *Parsons* in terms of what lies beyond federal reach, not what lies within it. The Privy Council’s determination that federal authority “does not comprehend the power to regulate by legislation the contracts of a particular business or trade . . .”⁵⁵ has presented a formidable obstacle to any sort of nationally integrated economic management and

planning that does not otherwise fall within federal jurisdiction.⁵⁶ Nevertheless, the following discussion posits that this dictum may be less formidable than conventional wisdom suggests. Taken together, both branches of *Parsons* will support a more expansive view.

INTERPROVINCIAL AND FOREIGN TRADE: REGULATING THE FLOW OF COMMERCE

The threshold notion of a common market within Canada, allowing for the duty-free movement of commodities throughout the country, is not constitutionally controversial. Moreover, a textual guarantee for a common market⁵⁷ was furnished by the founding fathers in addition to the judicially implied scope of s. 91(2) so that, in sum, the “direct” regulation of the movement of goods either across provincial lines within Canada or across national borders would be exclusively national (federal) in character.⁵⁸

Chief Justice Kerwin elaborated on this relatively simple concept in the *Farm Products Marketing Act* reference of 1957:

Once an article enters into the flow of interprovincial or external trade, the subject-matter and all its attendant circumstances cease to be a mere matter of local concern. No change has taken place in the theory underlying the construction of the British North America Act that what is not within the legislative jurisdiction of Parliament must be within that of the Provincial Legislatures. This, of course, still leaves the question as to how far either may proceed. . . .⁵⁹

So much for simplicity! The perceived constitutional requirement to establish the limits of federal authority over the flow of commerce in relation to provincial jurisdiction over local trade, while maintaining some semblance of a constitutional balance in the result,⁶⁰ necessitated a strict judicial approach — expressly framed to avoid an open invitation to the untrammelled exercise of federal power. Consequently, the pendulum swung strongly in the opposite direction.

The courts have characterized the issue of regulatory competence in terms of the kinds of transactions reached by the challenged legislation. Thus, the federal ability to regulate the “flow of commerce,” as distinguished from particular trades *in* the province, begins only when a transaction ceases to be “local” in the sense that it reaches across a provincial or national boundary.⁶¹ Federal regulatory competence similarly ceases, it appears, when commodities again become the subject of transactions exclusively local in character.⁶²

Sir Lyman Duff was the primary architect of a judicial approach that we might call “specific transaction analysis,” for the purpose of defining the constitutionally permissible scope of a particular legislative enactment under s. 91(2). Such an approach leaves little room for comprehen-

sive regulatory competence over trade in particular commodities, even where commercial transactions are for the most part interprovincial and transnational in character.⁶³ Accordingly, in *The King v. Eastern Terminal Elevator Co.*, a federal attempt to regulate local aspects of Canada's predominantly international trade in wheat was *ultra vires* the power of Parliament even though "[i]t [was] undeniable that one principal object of [the impugned legislation] is to protect the external trade in grain . . ."⁶⁴:

It does not follow that it is within the power of Parliament to accomplish this object by assuming, as this legislation does, the regulation in the provinces of particular occupations, as such, by a licensing system and otherwise, and of local works, and undertakings, as such, however important and beneficial the ultimate purpose of the legislation may be. . . .⁶⁵

Justice Duff (as he then was) rejected the practical extension of federal regulatory jurisdiction to cover a single market as a Trojan horse founded on "two lurking fallacies" potentially fatal to the federal principle that the Court was obligated to maintain. First, local regulation could not be justified as a mere incident of regulatory policies in relation to predominantly extraprovincial or international undertakings. "Obviously," in Duff's view, "that [was] not a principle the application of which can be ruled by percentages." Second, it was equally dangerous to suggest that Parliament might assume "such power [simply] because no single province, nor, indeed, all the provinces acting together, could put into effect such a sweeping scheme."⁶⁶

As Chief Justice, Duff consolidated his views in the *Natural Products Marketing* case, which the Privy Council affirmed,⁶⁷ and he still left open the possibility for "such ancillary legislation as may be necessarily incidental to the exercise of [federal] powers."⁶⁸ It remained difficult, however, to appreciate under what circumstances his test for federal regulatory competence allowed for ancillary legislation, except in situations so limited as to be of little practical value for purposes of ensuring comprehensiveness in a federal regulatory scheme. Where federal legislation has the "effect" of regulating local transactions, even though the aim or "pith and substance" of the regulatory scheme is clearly otherwise, a strict division of powers was still likely to govern.

The Supreme Court of Canada remains sensitive to Chief Justice Duff's original concerns. More recent case-law has permitted certain federal encroachments on local transactions as necessary incidents to an extraprovincial scheme.⁶⁹ Similarly, provincial legislative schemes that purport to govern transactions involving out-of-province purchasers, even in pursuit of an otherwise valid provincial purpose, have been summarily chopped off as an *ultra vires* encroachment upon federal jurisdiction.⁷⁰ Taken together, however, these developments do not con-

stitute a radical shift in the judicial characterization of the first branch of the trade and commerce power.

Local transactions are still local even though provincial regulation might impact on the flow of commerce.⁷¹ Until the flow has commenced, federal regulation remains incompetent to deal with it. Regulation of production in a particular commodity would appear to precede entry into the flow of commerce. The ultimate destination of the commodity does not enjoin provincial regulation, which remains in pith and substance local, notwithstanding the possibility of extraprovincial effects.⁷² Similarly, an extraprovincial destination does not justify a reaching back of federal authority into the provincial sphere before a product leaves its place of origin.⁷³

On the other hand, where production and marketing can be seen to commence with transactions that are extraprovincial in character or in which the control of production relates entirely to an extraprovincial market, federal legislative jurisdiction may get an early start. The Supreme Court has thus far disallowed provincial regulation in such a situation as, for example, in the *CIGOL* case involving well-head purchases of crude oil within an interprovincial oil pipeline grid, and again, in *Central Canada Potash*, with respect to the regulation of potash production devoted exclusively to an international market. Still, whether or not the Supreme Court would uphold federal legislation on similar grounds is a different question which suggests a more problematic response, even assuming that the novel circumstances required could be met.⁷⁴ In any event, such circumstances are so rare that there is unlikely to be any significant extension of federal power.

Similarly, federal legislative competence ceases where transactions in a particular commodity again become intraprovincial in character. Thus, in the *Dominion Stores* case,⁷⁵ the solution for the majority of the Supreme Court, confronted with deciding between the applicability of virtually identical and competing federal and provincial grading schemes for agricultural products, was simply to find the federal scheme inapplicable to intraprovincial transactions⁷⁶ and leave it at that.

Whatever latitude resides in the approach of characterizing the constitutionality of legislation according to the transactions they reach appears to arise after the flow of commerce has commenced rather than before.⁷⁷ In either event, however, the latitude allowed remains minimal.

It can be argued that traditional case-law distinctions separating international trade from local transactions may no longer be valid in light of the increased interdependency between internal economic decision-making and international trade relations. Nevertheless, judicial inclinations to recognize and accommodate the modern realities of the international marketplace cannot go so far as to shift the constitutional categories of legislative competence from one level of government to another. The most that can be said for legislative competence in relation to our

expanding conceptions of international trade is that the Constitution mandates the necessity of a cooperative venture.⁷⁸

GENERAL REGULATION OF TRADE AND COMMERCE

The second branch of the *Parsons* test, in which Sir Montague Smith suggested that s. 91(2) might "include general regulation of trade affecting the whole Dominion,"⁷⁹ has persisted more as a theoretical possibility than as a practical foundation for federal regulatory jurisdiction. The general trade and commerce power was applied twice by the Privy Council, once in upholding federal legislation defining the powers of federally incorporated companies,⁸⁰ and again with respect to national trademarks.⁸¹ However, the dimensions of the general trade and commerce power were never adequately explained except to the extent that this mandate entitled Parliament to address a "question of general interest throughout the Dominion."⁸²

Chief Justice Duff had been given an early opportunity to elaborate on the general trade and commerce power under s. 91(2) in the *Board of Commerce* case⁸³ but decided to reject it instead as a dangerous and unmanageable encroachment on local autonomy. Regulation in the general interest, in Duff's view, did not extend to allowing decisions on a case-by-case basis at the local level even if such a programme were to be implemented nationally, as Parliament had proposed to do in the monitoring of postwar practices of unfair pricing and the hoarding of scarce necessities of life.⁸⁴ This position was consistent with Duff's later views encompassing a "transaction analysis" of interprovincial and foreign trade for purposes of policing the division of powers — the idea that s. 91(2) could not be used for the purpose of regulating transactions in particular trades or industries within a province.⁸⁵

A majority of the Supreme Court projected a complementary view on the limits of federal power in the *Labatt Breweries* case,⁸⁶ which invalidated the product identification standards of the federal *Food and Drugs Act* in relation to the marketing of beer.⁸⁷ Given that the localized production of beer precluded a flow-of-commerce justification, Mr. Justice Estey considered and rejected the use of a general trade and commerce rationale. Estey reaffirmed the *Wharton* test of "general interest throughout the Dominion," but followed Duff in concluding that "[w]hat clearly is not of general national concern is the regulation of a single trade or industry,"⁸⁸ such as the production of beer.

Labatt Breweries is one of several cases in which the Supreme Court has flirted with the notion of a general trade and commerce jurisdiction. Finally, in the 1983 Term, the occasion arose in the *Canadian National Transportation* case⁸⁹ for a minority of the court, following Justice Dickson, to give the general trade and commerce power its first thorough elaboration in Canadian jurisprudence.

The primary focus of this litigation was the same issue that the Supreme Court of Canada had avoided in the earlier case of *R. v. Hauser*⁹⁰ — whether the exclusive prosecutorial authority of the federal Attorney-General could be sustained in relation to federal jurisdiction, solely on the basis of the criminal law power. A majority of the Court, following Chief Justice Laskin, argued that it could, and upheld the constitutionality of the conspiracy section of the *Combines Investigation Act*,⁹¹ including exclusive federal prosecutorial discretion, as a valid exercise of federal jurisdiction, notwithstanding provincial jurisdiction over the administration of justice under s. 92(14) of the *Constitution Act, 1867*.⁹² The minority agreed in the result only by founding the exclusive authority of the federal Attorney-General in preference to provincial Attorneys-General on another head of s. 91 in addition to s. 91(27), in this instance the trade and commerce power.⁹³ In the companion case of *R. v. Wetmore and A.-G. Ont.*,⁹⁴ Justice Dickson's view of the constitutional limits on federal prosecutorial discretion did not prevail.⁹⁵ However, his interpretation of s. 91(2) in *Canadian National Transportation* may yet gather a following in subsequent cases.

Justice Dickson's characterization of the second branch in *Parsons* expressly affirmed Justice Estey's opinion in *Labatt Breweries*,⁹⁶ with which Dickson admits he concurred.⁹⁷ Nevertheless, His Lordship disagreed strongly that foreclosing direct federal jurisdiction over particular businesses and trades necessarily led to Duff's proposition in *Board of Commerce* that valid federal regulations could not under any circumstances take the form of orders directed at local trades in the "general interest":

Every general enactment will necessarily have some local impact, and if it is true that an overly literal conception of "general interest" will endanger the very idea of the local, there are equal dangers in swinging the telescope the other way around. The forest is no less a forest for being made up of individual trees. . . .⁹⁸

Contrariwise, if Justice Duff was correct in his analysis, "then," Dickson answers, "no economic legislation could ever qualify under the general trade and commerce power."⁹⁹ That result, however, was a practically (if not theoretically) correct conclusion to draw, until now.

For Dickson, the regulation of particular businesses or trades, which still remains an unconstitutional exercise of federal power, changes character "when what is at issue is general legislation aimed at the economy as a single integrated national unit rather than a collection of separate local enterprises."¹⁰⁰ When the qualitative distinction is appreciated with the required precision, constitutional objections to the general regulation of trade that interfere with particular businesses or trades finally disappear.

The relevant criteria for purposes of characterizing a federal legis-

lative enactment, either as a colourable attempt to regulate a bundle of local trades or as a general regulation of the national economy, Dickson draws from indicia outlined by Chief Justice Laskin in *MacDonald v. Vapor Canada*.¹⁰¹ A valid exercise of the general trade and commerce power, which the Chief Justice did not find in the challenged provision of the *Trade Marks Act*¹⁰² considered in *MacDonald*, suggested an incorporation of the following elements:

- the presence of a national regulatory scheme;
- ongoing supervision of such a scheme by a federal regulatory agency;
- concern with trade in general rather than with an aspect of a particular business.¹⁰³

Further, Justice Dickson added two more criteria in the form of judicial perceptions of the end in view, rather than particular specifications for an appropriate legislative scheme, “namely (i) that the provinces jointly or severally would be constitutionally incapable of passing such an enactment and (ii) that failure to include one or more provinces or localities would jeopardize successful operation in other parts of the country.”¹⁰⁴

The opinion of Justice Dickson strikes an appropriately cautionary note on the exhaustiveness of the list and the decisiveness of any or all of the criteria, even though in the case at bar they were fulfilled and the federal enactment was upheld:

The proper approach to the characterization is still the one suggested in *Parsons*, a careful case by case assessment. Nevertheless, the presence of such factors does at least make it far more probable that what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones. . . .¹⁰⁵

It remains to be seen whether Justice Dickson’s interpretation of general trade and commerce will actually expand the federal mandate under s. 91(2). His appointment to the office of Chief Justice, replacing the late Chief Justice Laskin, may be influential in this regard, but it is a factor which can easily be overstated.¹⁰⁶ Still, this new avenue may be of particular benefit in assisting federal authorities to adapt national market structures to maximize our international economic competitiveness.

The Dickson test suggests federal competence in the face of provincial incapacity. To take one small example, treaty arrangements lie beyond provincial purview. External trade policies are often formulated in terms of mutually reinforcing international obligations such as those embodied in the GATT. Moreover, following Dickson’s second criterion, failure to enforce the obligations throughout all relevant economic sectors in the country, even in the face of local opposition, could be fatal to the enterprise. In keeping with the limits imposed by *Labour Conventions* on the implementation of treaties by the federal government — and even if

POGG is no help — the Dickson formula for general trade regulation may also permit more adventurous federal policies in the field of external trade, notwithstanding the previously persuasive objection that local trades are incidentally affected.

Of course, where international obligations lack generality in that their focus is a particular industry or trade, or a loose collection of trades wherever situate, the general trade argument would not likely sustain federal jurisdiction. Nevertheless, to say that Parliament will have to tread carefully in this respect in no way supports a conclusion that Parliament should not tread at all.

TESTING THE LIMITS: TWO EXAMPLES

The scope of federal jurisdiction to regulate trade and commerce and, therefore, to implement policies concerning external trade relations, appears under the first branch of *Parsons* to be restrictive yet determinable. Under the second branch of the test, a potentially wider scope exists, but perceptions of constitutional validity seem much more uncertain. The possibilities for extending the scope for federal initiative, and the limits thereto that continue to operate, are best illustrated by concrete examples.

An Easier Case

For some time the United Nations has been striving to develop and establish uniform commercial practices to promote both equity and certainty in the international marketplace.¹⁰⁷ One such initiative has borne fruit in the United Nations Convention on Contracts for the International Sale of Goods (CISG)¹⁰⁸ adopted by the Diplomatic Conference at Vienna in 1980. Although not yet in force,¹⁰⁹ the Convention has received the signatures of a large number of states, including the United States and many of Canada's other major trading partners.¹¹⁰ Canada has not signed the Convention, which is somewhat surprising, especially as there is no legal commitment imposed to ratify the instrument.

The merits and shortcomings of the Convention need not be considered here.¹¹¹ It appears, however, that there is considerable support within the Canadian practising bar, and in both academic and business circles for what the Convention is trying to achieve.¹¹² Nevertheless, the position of the federal government is that it lacks the constitutional capacity to pursue the initiative without the consent of the provinces,¹¹³ relying once again on the spectre of *Labour Conventions*. Ottawa did commission an analysis of the Convention for discussion at the 1981 annual meeting of the Uniform Law Conference in Whitehorse.¹¹⁴ The Conference's ensuing recommendation, however, was simply to remit consideration of the Convention to the individual deliberation of each provincial jurisdiction.¹¹⁵ We are left to suppose that federal authorities

might choose to sign the Convention subsequently if the provinces wanted it, which is hardly an encouraging precedent for central leadership in the national interest, especially in view of the potential benefits for private-sector external economic relations.

Can the initial federal position on the CISG be explained in terms of any real constitutional limitations on federal power? If the existing legal doctrine surrounding s. 91(2) or the residual power under POGG measures up to the task, then the problem is one of political will, not a deficiency in the constitutional mandate given to the central government.

In the first place, Art. 1(1) of the CISG reaches only international contracts "between parties whose places of business are in different States." Even under a strict transaction analysis following Chief Justice Duff,¹¹⁶ it would be difficult to describe the contractual relations governed by the CISG as intraprovincial in nature. Similarly, general commercial standards with respect to international contracts represented by the treaty suggest a general interest with respect to the regulation of the national economy as a whole. True, such a regime does not necessarily imply that a regulatory scheme is necessary; which raises the problem of meeting the criteria specified in *MacDonald v. Vapor Canada*.¹¹⁷ On the other hand, a resort to Dickson's additional criteria in *Canadian National Transportation*¹¹⁸ shows: first, with respect to incapacity, that a similar initiative lies beyond provincial powers to effect, and second, on the requirement of comprehensiveness, that a checkerboard implementation of the scheme would seriously undermine its efficacy as an asset to all the Canadian businesses that are pursuing international contracts, wherever in Canada the CISG does not apply.

What if the foregoing arguments fail to convince and the Convention may be said to reach too far into contractual relations falling within the provincial sphere? Then, the CISG still contains a federal state clause¹¹⁹ that would permit Canada to enter into the Convention, bringing in only those provinces that are prepared to consent to and implement the domestic legal arrangements required by the treaty. In my view, there is a strong case for the proposition that Ottawa has all the power it needs to sign and ratify the CISG without resort to federal state clauses. The fact that federal authorities still plead paralysis, even with the added flexibility that the treaty provides, remains all the more puzzling.

If indeed the CISG holds promise for enhancing export trade, constitutional impediments are a feeble and unwarranted excuse for not signing the Convention. The reasons why nothing has been done lie elsewhere, and the Constitution is not to blame.

A Harder Case

In the fall of 1982, a coalition of approximately six hundred companies and nine trade associations representing the U.S. softwood lumber industry filed concurrent countervailing duty petitions with the Interna-

tional Trade Administration (ITA) of the U.S. Department of Commerce and the International Trade Commission (ITC), claiming material injury from Canadian softwood lumber imports.¹²⁰ The coalition argued that programmes, policies and practices of Canadian federal and provincial governments pertaining to the forest products industry in Canada amounted to a subsidy in violation of the U.S. countervailing duty law.¹²¹

In October 1982, the Department of Commerce began investigating some 55 alleged federal and provincial government subsidy programmes of the Canadian forest industry.¹²² That November, the commissioners of the ITC followed with a further preliminary determination and accompanying staff reports, indicating that industries in the United States had been materially injured by imports of softwood lumber from Canada.¹²³ Whether or not any action could be taken on the matter rested with the ITA, which found the case too complex for an immediate ruling and postponed its decision until the following year.¹²⁴

The ITA finally rendered a negative preliminary determination on the coalition's petition, in March 1983.¹²⁵ It found that certain of the Canadian programmes under investigation conferred *de minimis* subsidies while others conferred none at all; in any event, there did not appear to be a violation of U.S. law such that countervailing duties on imported Canadian softwoods would be justified.¹²⁶ The plaintiff coalition then applied for judicial review of the ITA ruling before the U.S. Court of International Trade in New York.¹²⁷

On March 21, 1983, the coalition brought a motion to expedite the hearing of the application, together with a statement of claim and an Order to Show Cause why the motion should not be granted. It is apparent from the affidavit in support of the U.S. Government's answer to the coalition's bid to expedite, that the governments of Canada and various provinces were aware of these proceedings at the very latest by January 1983.¹²⁸ The Department of Commerce had sent case analysts to government departments throughout Canada for the purpose of verifying materials submitted in the investigations as to the nature of the alleged government subsidies. Furthermore, the preliminary determination of the ITA describes findings concerning government subsidies in Alberta, British Columbia and Quebec, in addition to applicable federal programmes and federal-provincial cooperative schemes.¹²⁹ Clearly, there was no unfair surprise from the point of view of the Canadian governmental interests that were implicated by the coalition's petition.

Federal officials in Ottawa confirm that they were fully apprised of the countervailing duties petition during this period and were considering the possibility of an intervention. The government of British Columbia, with its substantial interest in the forest industry, approached Ottawa with the same idea and apparently suggested the possibility of a joint intervention, for which the federal authorities showed little enthusiasm

since they wished to avoid the impression of a provincial diplomatic presence.¹³⁰ In any event, no level of government in Canada ever became formally involved; evidently there was some confidence that the ITA would adhere to and manage to prove the correctness of its preliminary finding — that there was no case for countervailing duties to be applied to Canadian forest products. Eventually, this confidence proved well founded.

On March 31, 1983, the Court of International Trade granted the coalition's motion to expedite.¹³¹ At this point, however, the style of cause was amended, granting the status of defendant-intervenor¹³² to a group called the Canadian Softwood Lumber Committee, represented by Washington-based U.S. attorneys. Both U.S. federal authorities and the Committee brought motions to dismiss the action then confined to the expedited hearing schedule and succeeded in having the case thrown out.¹³³ At the end of May, the ITA made its final determination, which brought the matter to a close in Canada's favour.¹³⁴

Who was the Canadian Softwood Lumber Committee and what effect did its intervention have on the outcome of the proceedings? While it is fair to say that the case was probably going Canada's way in any event, the existence of the Committee does appear to have substantially reinforced the defence efforts of the U.S. Department of Commerce. Apparently, the Committee was an unincorporated informal organization representing the interests of the Canadian forest industry and was convened almost exclusively for the purpose of participating in this particular countervailing duties case. Most of the impetus for the private Canadian effort appears to have come from the Council of Forest Industries, based in British Columbia. There was no formal connection between the Committee and the Government of British Columbia, although there was considerable informal cooperation by government officials. All participation and financial support for the effort came from private sources within the forest industry across Canada.¹³⁵

With the conclusion of litigation, the Canadian Softwood Lumber Committee lapsed. It appears, however, to have a successor, since the idea worked so well. A permanent umbrella organization has been established to give the industry "a unified national voice" in the event of future assaults on its export market. Specifically geared to respond to international trade disputes affecting the forest industry, the newly formed Canadian Forest Industries Council (CFIC) effectively represents 90 percent of industrial forest users through its 16 founding associations.¹³⁶

The foregoing account furnishes an excellent example of how the private sector has managed to organize itself and respond in a timely fashion to an attack on Canadian foreign trade where governments were either unwilling to or incapable of doing so. Moreover, the private interests in this case established a suitable organizational structure for focussing their effort; the interested governments did not.

The apparent view of government that the countervailing duties case did not merit formal intervention seems rather beside the point. The Canadian government did not possess any specifically tailored institutional apparatus for mediating and ultimately coordinating the combined federal and provincial interests implicated by the U.S. proceedings. The forest industry lost no time in creating such machinery but it does not appear that some federal authorities were fully apprised of its existence — until after the event.¹³⁷ The chief industry organizer of the Committee's intervention stresses, however, that the industry received excellent cooperation from both federal and provincial officials, notwithstanding initial interjurisdictional disagreements between them.¹³⁸ Whether federal and provincial authorities could have done as well together on the industry's behalf is another matter.

The happy conclusion of the countervailing duties case should not be considered a good example of cooperative federalism at work. The forest industry presents a classic illustration of divided jurisdiction: the Royal Prerogative governing the execution of foreign affairs and legislative jurisdiction over international trade dovetailing — or at loggerheads with property and civil rights in the province.¹³⁹ It has been argued, with some persuasiveness, that protectionist interests tend to dominate when trade problems are dealt with ad hoc on a case-by-case basis, while trade liberalization fares considerably better in the context of reciprocal negotiation in an international forum.¹⁴⁰ In this case there was no institutional framework in place that would have made possible a coordinated approach by the two levels of government while appreciating both private sector priorities and international realities. What if the industry had not been in a position to protect itself?

Where governments must work together at short notice, ready-made infrastructures for facilitating cooperation in particular international market sectors important to Canada may have advantages that far outweigh their costs. In situations over which the national government is constitutionally precluded from unilateral solutions, such mechanisms could also prove indispensable for effectively protecting foreign markets.

Northern

Provincial Powers and the Internal Dimension of External Trade Relations: POGG in the Province

The ability to secure external trade relations through formally binding legal instruments, subject to the law of nations, does not extend to provincial governments.¹⁴¹ Nevertheless, provincial governments may negotiate and maintain "informal" commercial and other contracts abroad, on the basis of reciprocity. Several provinces, notably Ontario and Quebec, have in fact established a highly visible presence outside Canada's borders, through permanent offices of information and peri-

odic trade missions, notwithstanding growing federal concern regarding representational conflict and inconsistency in Canadian diplomatic relations.¹⁴² Moreover, the Constitution permits the provincial legislatures to implement reciprocal understandings even to the extent of referentially incorporating foreign law.¹⁴³ All of this lies beyond federal purview, provided that the provinces do not attempt to execute policies outside either their legislative mandate or their discretionary powers of internal management and control as, for example, in the case of a government monopoly.

Legislative Powers

The principle of exhaustiveness in the federal division of powers¹⁴⁴ provides a useful starting point for assessing provincial bases of jurisdiction relevant to external trade. By necessary implication, the limits of federal jurisdiction also suggest the parameters of provincial competence over the remainder of the field. In *Canadian National Transportation*, Justice Dickson described the Canadian approach, originally articulated by Justice Duff, as primarily a process of “simple subtraction” from the existing categories of federal power. Thus, the categories in *Parsons* “did not authorize the regulation of the contracts of a particular business or trade.”¹⁴⁵ This shortfall left generous regulatory powers in the provincial governments, largely accounted for by the preceding discussions of federal jurisdiction. Accordingly, we may briefly recapitulate that account in the provincial context, enlarging it where appropriate, to cover separate provincial mandates.

PROPERTY AND CIVIL RIGHTS IN THE PROVINCE

Section 92(13) of the *Constitution Act, 1867*, together with s. 92(16) conferring jurisdiction over “all Matters of a merely local or private Nature in the Province,” provide a local mandate for peace, order and good government by provincial legislatures — so long as the reach of provincial law does not extend beyond the provincial boundary. Statutory reaching out by a province beyond its borders even when it is framed in response to purely local matters, still exceeds the constitutional grasp of provincial legislatures.¹⁴⁶

We have seen that the perceived limited resurgence of the trade and commerce power was based in part on successful challenges to attempted provincial regulation of transactions allegedly extending beyond the province, thus constituting an interference with the flow of commerce.¹⁴⁷ When the transaction can be characterized as local, however, a province may generally do what it will. Logically, it should not matter whether local regulation of trade applies to goods on their way out of the province or to those on their way in, provided that the

regulation itself remains local in character. Where the object of regulation is at the stage of production or local processing, it is relatively easy to demonstrate that provincial regulation does not reach interprovincial or extraprovincial commercial transactions, since the flow of trade has yet to commence.¹⁴⁸ The only judicial authority supporting federal ancillary jurisdiction to regulate commercial transactions at this stage is in relation to the wheat trade;¹⁴⁹ given the nature of the beast,¹⁵⁰ it may be a unique case. From the provincial side, case-law equally supports the reverse proposition, that incidental effects on interprovincial or export trade resulting from the provincial regulation of local production are not constitutionally objectionable.¹⁵¹

Where goods are emerging from the flow of trade for marketing in a province, the answer, as to which side prevails, becomes more problematic. On the one hand, the argument that ancillary federal jurisdiction reaches local transactions may justify a more liberal approach when the legislation purports to deal with imported commodities.¹⁵² On the other hand, in the event of a direct conflict between a provincial regulatory scheme at the local level and the ancillary application of federal law, the federal scheme will more than likely have to give way.¹⁵³

The only reservation we might have to the foregoing principle would be if Parliament chooses to utilize fully the second branch of *Parsons*, and the Supreme Court vindicates such legislation through a rather enthusiastic adoption of Mr. Justice Dickson's explication of the general trade and commerce power in *Canadian National Transportation*.¹⁵⁴ Pursuant thereto, indeed, the provinces might be forced to relinquish their control over certain aspects of local trade. However, this newly articulated doctrine clearly does not extend to the eclipsing of provincial jurisdiction with respect to specific businesses or particular commodities. Moreover, from the international trade perspective exemplified by the GATT, specific economic sector controls and adjustments keyed to particular industries are what Canadian external trade policies must embrace — and what lies beyond Ottawa's reach at the local level.

OTHER BASES OF JURISDICTION

Taxation

The power of the provinces to tax business directly within the province¹⁵⁵ does not appear on its face to affect external trade. On the federal side, the "common market provision" in s. 121 of the *Constitution Act, 1867*, precludes customs duties between the provinces, and the doctrine of paramountcy remains available in the event an irreconcilable conflict arises between provincial and federal direct taxation schemes. Further, customs and excise were transferred from the provinces to the Dominion by s. 122; provincial powers in this field are now spent.¹⁵⁶ Moreover, as

with property and civil rights, provincial taxing powers cannot, as a general matter, have extraterritorial application, unlike federal taxing powers.¹⁵⁷ Similarly, where the effect of a provincial taxation scheme is to regulate a federal field, for example, banking¹⁵⁸ or export trade,¹⁵⁹ the allegedly colourable use of legislative authority would be vulnerable to constitutional attack. Such an argument would not apply, however, to the taxation of a single business or trade that otherwise falls within provincial jurisdiction, nor to the direct taxation of consumers of imported goods sold in the province.¹⁶⁰

Natural Resources

It remains to be seen what significance the new s. 92A added to the *Constitution Act, 1867*¹⁶¹ will have for provincial regulatory taxing powers in relation to non-renewable natural resources. The direct taxation limitation is gone, but indirect tax schemes still may not discriminate between local and extraprovincial purchasers since, by s. 92A(4), "such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province."

A more basic problem for present purposes may be whether any regulatory taxing scheme used by a province can regulate export trade in the commodities reached by the section. The constraints imposed under s. 92A(2) suggest otherwise. It stipulates that:

(2) In each province, the legislature may make laws in relation to the *export from the province to another part of Canada* of the primary production from non-renewable natural resources . . . but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada. [Emphasis added.]

A threshold critique of s. 92A(2) by William Moull declares that the qualifying words "to another part of Canada" operate "to remove completely any provincial power to legislate regarding an export of production from the province that also happens to be an export from Canada."¹⁶² Moull emphasizes that, while the result in the *CIGOL* case might be decided differently today if the challenged Saskatchewan legislation could be characterized simply as a non-discriminatory indirect tax scheme, the same scheme could fall again if viewed primarily as an "export tax" impacting on export trade.¹⁶³ Since, in fact, most of the Saskatchewan oil at issue in *CIGOL* went only to other parts of Canada and not abroad, s. 92A might still support a positive outcome for the province on the merits.¹⁶⁴ However, the same could not be said for the *Central Canada Potash* ruling¹⁶⁵ or, indeed, for any provincial regulation of a resource that has an almost exclusively foreign market at the primary level of production.

Even if Moull's analysis were to prove mistaken, the paramountcy

provision in s. 92A¹⁶⁶ specifies the result where a provincial regulatory scheme runs afoul of a federal one in the overlapping fields of production and marketing of natural resources. This may be a less than satisfactory answer to sectoral balkanization of the national economy, as the doctrine of paramountcy is uncertain in application;¹⁶⁷ however, it will provide a last-resort solution to otherwise irreconcilable interjurisdictional rivalries.

Licensing

Provincial licensing powers in s. 92(9) relate both to taxation and general regulation, although licensing has not been characterized as a regulatory power per se.¹⁶⁸ Rather, as the wording of s. 92(9) suggests, it appears restricted “in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.” Similarly, the section does not supply a constitutional basis for indirect taxation that is otherwise prohibited unless, as Gérard La Forest has demonstrated, the licensing fee serves to defray the expenses of an independently valid provincial regulatory scheme.¹⁶⁹ An example might be the licensing of retail outlets exclusively for domestic wine producers within what is, in all other respects, a constitutionally valid provincial monopoly in a concurrent field from which federal authorities have gradually withdrawn.¹⁷⁰ In the result, it is said that the provincial licensing power has no independent force of its own,¹⁷¹ which brings us back, full circle, to the persistently impressive reach of s. 92(13).

Governments as Participants in the World Market

Provincial powers in relation to “property and civil rights” can have an impact, particularly with respect to non-tariff barriers to trade.¹⁷² Product standards imposed for purportedly technical reasons, consumer protection or public health and safety¹⁷³ can effectively preclude the marketing of non-conforming commodities. Regulations of this kind are easily translated into implicit preferences for domestic producers over foreign competitors in local markets. Yet, all such regulation falls easily within the confines of the regulation of particular businesses or trades in the province.

The effect of indirect restrictions on foreign trade relations is magnified even further under certain situations in which governments not only regulate economic activity in relation to specific businesses and trades, but also generate most of the business themselves. The freedom that remains to make business decisions after all regulatory requirements are met and in situations in which regulatory mechanisms simply do not pertain, raises a whole new series of issues when governments themselves become major economic actors in a particular business or trade.

THE POWERS THAT ARE EXERCISED

Much of the power that governments wield in local, national and international marketplaces results simply from the scale of government in the modern era. The mere size of the machine — not to mention what it takes to feed it — tells much of the story.

The spending power of government can be just as, if not more, potent than its regulatory power.¹⁷⁴ Moreover, the public purse remains free from constitutional strictures, unlike legislative jurisdiction to pass particular laws. In 1972, the Gray Report on foreign ownership of the economy estimated that more than \$5 billion was spent annually by all levels of government in the procurement of goods and services.¹⁷⁵ Klaus Stegemann has demonstrated that, while the figure cited in the Gray Report represented only 6 percent of Canada's Gross National Product (GNP) in 1970, government procurement policies had a much greater impact in particular market sectors where the Crown tends to be the main buyer.¹⁷⁶ In the fiscal year 1977–78, the overall estimate of procurement expenditures had ballooned to the vicinity of \$30 billion.¹⁷⁷ Canada was not unique in this respect, as the procurement issue escalated in tandem with burgeoning public expenditures to the level of widespread international concern.

The Contracting Parties to the GATT placed government procurement prominently on their list of non-tariff barriers that were the subject of the recently completed Tokyo Round of Multilateral Trade Negotiations. In keeping with the overall goal of the GATT to promote global free trade, the negotiations were intended to remove or reduce as many non-tariff impediments to international trade as possible. The effort resulted in the Agreement on Government Procurement, to which Canada is a party.¹⁷⁸ Simply put, its purpose was to open up national market sectors dominated by government buying power.¹⁷⁹ An international agreement of any kind on non-discrimination in government purchasing may be regarded as quite an achievement:

Until the last decade, the issue was hardly open to discussion and debate, and governments held it as an article of faith that they should, whenever possible, return tax revenues to their own economies by reserving the bulk of their purchasing to their domestic suppliers; for this reason governments have been slow to criticize others for adopting a similar course. . . .¹⁸⁰

However, each party to the agreement can carefully control the extent of its coverage, and its application remains far from complete. The agreement reaches only those government institutions that each contracting party specifically enumerates.¹⁸¹ There are notable absences from each list that reflect the domestic economic priorities and internal political-legal and constitutional constraints of the particular signatory.

For example, the Canadian list of entities to which the GATT agreement applies omits provincial government departments and Crown corporations. There are none included because, as Professor de Mestral has pointed out, "Canada made no offers [in the GATT negotiations] affecting them."¹⁸² Given the complexities of divided autonomy in a federal state, such omissions are not surprising. However, they appear significant in that federal procurement alone accounts for less than half of the total annual expenditures by government entities in Canada.¹⁸³

Generally speaking, how governments conduct their own business as independent economic actors within a federal state lies beyond the purview of constitutional argument. The Constitution does not address the power of governments to spend public monies as it does their power to raise revenue by different modes of taxation. Furthermore, spending decisions and the criteria framing them seldom take the form of "hard law" traceable directly to statutory enactments or regulations that could provide a basis for judicial scrutiny. Most often, they result from executive action in the form of a cabinet decision or from the exercise of administrative discretion within a government department or agency. To the extent that criteria are specified, the internal operations of government and direct expenditures from the public purse do not suggest division of powers arguments; even where national governments employ "conditional grants" to persuade other levels of government to comply with particular policy objectives, such coercive tactics have not yet been subjected to constitutional attack.¹⁸⁴

If we take the government procurement issue as one element of Canada's external trade policy, it becomes immediately apparent that the Constitution does not furnish adversarial tools for federal authorities to extend compliance beyond the confines of their own house. That fact was appreciated by Canadian authorities during the Tokyo Round of the GATT, where it became necessary to resort to cooperative techniques between Canadian federal and provincial officials when it came to negotiating international compromises on specific issues. I document one such example in the section following.

Governments exert their presence in the marketplace by playing several distinct roles. First, as direct consumers of everything from paper clips and typewriters to the most sophisticated scientific equipment, they are very important if not exclusive customers for many market sectors — local, national and international. The aircraft industry, shipbuilding, telecommunications, and scientific and professional equipment have been identified as the most conspicuous examples of domination by government buying power.¹⁸⁵ Next, governments may themselves enter a market not otherwise adequately served, as in the operation of public utilities such as the Toronto Transit Commission; or they may compete with other private sector enterprises, as does a Crown corporation like Air Canada. Yet again, a government may choose to capture a market by force of law to take advantage of a monopoly

position in order to further its particular policy objectives. This is the situation conspicuously enjoyed by provincial liquor control boards in very lucrative local markets; it has had sufficient impact on international trade in wine and liquor that the procurement policies and practices of provincial governments have attracted the attention of Canada's trading partners under the GATT.

A CASE IN POINT

Through a rather untidy constitutional evolution, the social evil of intemperance matured into a local government monopoly for the marketing of alcoholic beverages in each province.¹⁸⁶ In Ontario, for example, the provincial Liquor Control Board (LCBO) has been granted quite complete powers to administer a system of controls on the purchase, importation, marketing and retail sale of alcohol under the *Liquor Control Act*.¹⁸⁷ The LCBO is a special corporate entity (s. 4(5)) intended to run at a profit (s. 5), which it does very nicely.¹⁸⁸

Ontario is one of three provinces with a substantial local industry in the making of alcoholic beverages. It has an expanding wine industry, as does the province of British Columbia, and both Ontario and Quebec, the two most populous provinces, play host to widespread brewing and distilling operations as well. Government procurement policies designed to favour wine and liquor concerns in the three jurisdictions have been long-standing irritants for Canada's trading partners in these commodities. Their complaints became focussed in the forum of the GATT and appeared finally on the agenda during the Tokyo Round negotiations on non-tariff barriers to trade.¹⁸⁹

The extent to which Canada could negotiate under the GATT concerning foreign access to the wine and liquor markets in various provinces in return for reciprocal or complementary privileges in external markets for similar Canadian products, depended on cooperative federalism. Nevertheless, this approach did not address a strictly *Labour Conventions* kind of problem. Formal coverage of alcoholic beverage imports under federal law does not undercut provincial purchasing policies.¹⁹⁰ Moreover, provincial enactments such as the *Liquor Control Act* discussed above do not directly prescribe most of the allegedly discriminatory practices that are the cause of the international complaints about non-tariff barriers.

When the liquor marketing problem first became prominent, prior to the Tokyo Round, Stegemann noted four sources of potentially discriminatory provincial decision-making in the alcoholic beverage market. They are the power to decide:

- i) What imported products are to be sold in the province.
- ii) What are to be the relative retail prices for domestic and imported products.

- iii) What products are to be “pushed” in retail outlets.
- iv) What privileges are to be granted for company-owned retail outlets of domestic producers. . . .¹⁹¹

Even if it could be said that the provinces are incapacitated from legislating in violation of international law,¹⁹² most of the decision-making to which Stegemann refers does not derive from specific legislative or regulatory enactments that could be subject to constitutional attack.

In Ontario, the LCBO is responsible to the Minister of Consumer and Commercial Relations. While the Lieutenant-Governor in Council may make regulations (s. 8), they may specify only such items as hours of business and retail policies of government outlets, manufacturing and product standards for local industry, and the conditions for granting liquor-purchasing permits for private individuals and groups.¹⁹³ Government buying practices, on the other hand, are set out in the annual budget¹⁹⁴ or in directives emanating from Cabinet or the Ministry of the Treasury and Economics;¹⁹⁵ these are then published¹⁹⁶ and applied by the Board.

The marketing practices of the LCBO permit effective discrimination against foreign competitors in the wine industry, at several points in the system. Beyond the initial decision to list and stock a particular product in the LCBO inventory,¹⁹⁷ only a small number of outlets in major centres are designated “all-brands” stores, which carry the complete list.¹⁹⁸ The products available in the majority of the retail outlets depend on the discretion of local managers, although the Board may specify “required listings” for all its outlets.¹⁹⁹ Thus, a local decision not to stock a particular item can easily curtail large-volume sales of particular foreign brands in preference to locally produced labels. From a legal point of view, it would be a virtually impossible burden of proof to distinguish improper discrimination against foreign producers in local retail outlets — assuming the existence of a legal remedy in the event such practices could be proved — from management decisions designed merely to meet the local customers’ demands. When we add to this system the existence of exclusive retail outlets for local producers outside regular government stores,²⁰⁰ the system confers a preferred market position on local industry in terms of access and visibility to the consuming public.

Moreover, against such forms of government procurement and marketing, the Constitution is silent. The tactic employed by federal authorities, with respect to those aspects of the Tokyo Round negotiations falling within areas of provincial jurisdiction, consisted of systematic, specific consultation with provincial government officials to obtain a consensus position for Canada to negotiate with other GATT members in return for mutually advantageous concessions benefiting Canadian for-

eign markets. To facilitate this process, Ottawa established a centralized federal-provincial consultative mechanism in the office of the Canadian Coordinator for Trade Negotiations which lasted for the duration of federal-provincial discussions prior to the Tokyo Round.²⁰¹ This decision to institutionalize federal-provincial consultation resulted in a marked improvement in Canada's performance over the Kennedy Round of negotiations in the 1960s, when there had been no such structure created.²⁰²

The process resulted in a joint "statement of intent" from all ten provincial governments covering the subject of alcoholic beverages in the GATT negotiations, which federal officials used to secure complementary concessions favouring Canadian products, notably bulk and bottled Canadian whiskey.²⁰³ The statement of intent provided, *inter alia*, that:

3. Any differential in mark-up between domestic and imported distilled spirits will reflect normal commercial considerations, including higher costs of handling and marketing which are not included in the basic delivery price.
4. Any differential in mark-up between domestic and imported wines will not in future be increased beyond current levels, except as might be justified by normal commercial considerations.
5. Each Canadian provincial marketing agency for alcoholic beverages will entertain applications for listing of all foreign beverages on the basis of non-discrimination between foreign suppliers, and commercial criteria such as quality, price, dependability of supply, demonstrated or anticipated demand and other such considerations as are common in the marketing of alcoholic beverages. . . .
Access to listings for imported distilled spirits will in the normal course be on a basis no less favourable than that provided for domestic products and will not discriminate between sources of imports.
6. Any changes which may be necessary to give effect to the above will be introduced as soon as practicable. However, some of these changes, particularly with respect to mark-up differentials, may be introduced progressively over a period of no longer than eight years. . . .

While both federal and provincial sources stress that the statement of intent was no more than that, and not legally binding,²⁰⁴ interested Contracting Parties to the GATT, particularly the United States, Italy and France, relied on the good-faith undertaking it represented. In turn, these mutual GATT undertakings did expose Canada to "best efforts" responsibility under Art. 24(12) of the GATT regarding subsequent compliance by its component political units.²⁰⁵

Following the conclusion of the Tokyo Round, the government of Ontario did not increase the markup differentials between local and imported wines. In 1979, the markups were 58 percent and 123 percent, respectively. In October 1982, then Treasury Minister Frank Miller

reduced the markups to 45 percent for Ontario and 110 percent for imported wines, consistent with the undertaking in paragraph 4 of the GATT statement of intent; but, at the same time, Miller imposed a handling charge of 65 cents per 750-millilitre bottle of foreign wine and a similar charge of 25 cents for Canadian wine produced outside Ontario. Although these charges appeared facially consistent with paragraph 3 of the statement of intent quoted above, Canada's trading partners, in particular the United States, protested that the Ontario handling charge so far exceeded the real extra costs entailed in the handling of foreign products as to constitute renewed price discrimination in violation of the 1979 agreement. LCBO officials candidly admit that part of the motivation for the October 1982 changes was to give Ontario wines a price advantage.²⁰⁶

Under a threat of U.S. retaliation in the form of countervailing duties on imports of Canadian rye whiskey, Ontario policy shifted again in 1983. On June 29 the government lifted the 1982 handling charge on U.S. wines, and subsequently lifted this charge for all other foreign wines. At the same time, all markups were reinstated to pre-October 1982 levels. In addition, however, the government also instituted non-discriminatory minimum "reference prices" applicable to all LCBO wine purchases, again designed to protect Ontario wines, this time from less expensive foreign brands. Overall, these changes actually operated to reduce the prices of medium-priced foreign wines — French, American, German, Spanish — but they prejudiced, in particular, cheaper Italian brands, excluding them altogether from importation to Ontario. In consequence, the complaints of one GATT Contracting Party objecting to provincial non-tariff barriers on foreign wine have been simply superseded by the complaints of other Contracting Parties since the Tokyo Round was concluded. The chorus of dissatisfaction persists from Canada's affected trading partners, causing the Department of External Affairs ongoing concern.²⁰⁷

The government of Ontario remains fully aware of the difficulties posed by the GATT, yet is equally forthright with regard to local priorities. The LCBO was exposed to a private legal challenge alleging that its pricing policies were unconstitutional for being in violation of the GATT; but the litigation has not progressed beyond its preliminary stages.²⁰⁸ Some domestic legal clarification of the issue may have proved helpful, given that the protectionist policies of Ontario in particular are exposing Canada to potential international embarrassment. The European Economic Community recently served notice that alleged Canadian discrimination against exports of wine, beer and spirits from member countries again constitutes a major irritant, purportedly in violation of Canada's international obligations under the GATT.²⁰⁹ In view of the original understanding in 1979, we should ask why the situation has been allowed to deteriorate, since "[t]he gains for Canada

in this sector were in considerable measure due to the cooperation of provincial governments.”²¹⁰

One possible explanation for the gradual disintegration of the 1979 internal consensus between Ottawa and Queen’s Park rests on the perception that the cooperative mechanisms responsible essentially disappeared after the consensus was attained and the Tokyo Round concluded. Therefore, the initial achievement proved increasingly ephemeral as a basis for a common understanding in the absence of a continuing institutional framework that could sustain it. The immediacy of constant local economic and political pressures tends to erode the episodic ad hoc achievements of cooperative federalism. This, at least, was an observation gathered from sources inside the government of Ontario, particularly in relation to the alcoholic beverages issue.²¹¹

In the Department of External Affairs, however, general perceptions contrast sharply with the point of view suggested above. A recent discussion paper, *Canadian Trade Policy for the 1980’s*, states optimistically:

The Tokyo Round experience of consultation with the provinces helped to improve the awareness and sensitivity of the federal government to provincial priorities and concerns and demonstrated to Canadian business and our trading partners that there can be effective federal-provincial consultations in striving to enhance market access conditions for Canadian exporters and thus improving Canada’s trade performance. . . . Through regular contact at the Ministerial and Deputy Ministerial levels (the first Federal-Provincial Meeting of Trade Ministers was held in June, 1982) and through federal-provincial committees, a more structured framework for consultations on international trade matters now exists. . . . These now play a useful role in the effective management of Canada’s trading interests, and will contribute to greater coordination and harmony between federal and provincial programmes and activities. . . .²¹²

These achievements may be real enough, but the contrast in perceptions at the federal and provincial levels remains instructive. The relative accuracy of governmental views matters less to the particular situation we have canvassed than the fact and significance of the difference between them.

No formal constitutional or purely legal remedy readily emerges for this kind of problem. In many respects it is largely an administrative affair between competing bureaucracies, superimposed on the immediate political realities of modern government. The broader national picture diffuses rapidly for local government officials in the absence of constantly renewed understandings that meet their changing priorities. Accordingly, something more durable than “flash in the pan” consensus arrangements, which require the participants to start from scratch every time, seems preferable for handling these external trade policy issues that clearly straddle the federal division of powers.

Alternative Methodologies

The jurisdictional limitations imposed on the centralized management of Canadian external trade policy exemplify the general limitations on efficiency occasioned by democratic government in a federal state. In a country as large and diverse as Canada, such problems are not surprising; and to the extent that they exist in the constitutional context, they must be allowed for. It is all too easy, however, to overstate the constitutional imposition, leaving a false impression of incapacity.

The foregoing analysis and the case studies it contains suggest a number of alternative methodologies directed to perceptions of constitutional inadequacy in the field of external trade policy. This section offers a summary and elaboration of promising avenues for the amelioration of existing perceptions which, it is hoped, will merit further attention by political and professional government actors.

Risk Taking

A declaration of constitutional incapacity makes an excellent excuse for lack of political will. Much of the analysis in the second section of this paper, on federal governance and jurisdictional limitation, supports the proposition that federal authorities have a stronger jurisdictional foundation for dealing with external trade policy issues than is readily admitted. An almost complete failure of federal initiative concerning the merits of adopting and implementing the United Nations Convention on the International Sale of Goods provides a useful illustration of government selling itself short when there was no compelling constitutional justification for doing so.

The barrier of *Labour Conventions* also furnishes a valuable buttress to the principles of federalism, but the hurdle it creates need not trip up particularized federal policies that could contribute to the international competitiveness of the national economy. Similarly, the tentative judicial resurrection of the trade and commerce power under both branches of the *Parsons* test — international commerce and the general regulation of trade — would appear to commend greater adventurousness by Ottawa alone when the occasion requires. Provided that the legislative foray does not suggest a colourable federal venture allegedly betraying ulterior motives that violate provincial legislative competence, the dangers of seemingly arbitrary judicial categorization leading to a declaration of *ultra vires* appear less acute than they once were. To be sure, the “transactions” test whereby the courts decide whether a particular legislative enactment pertains to interprovincial or international transactions continues to thwart federal policy initiatives. Still, if the exercise is worth the candle, such risks should be undertaken in preference to passivity supported by exaggerated pleas of constitutional incapacity.

Cooperative Federalism

In many cases, the unilateral stretching of jurisdictional limits by one level of government is not a viable alternative. Certain external trade policy issues sit precariously astride the federal division of powers. Such problems call for some kind of federal-provincial cooperation directed to the achievement of particular ends that the Constitution otherwise forecloses. External trade policy problems therefore illustrate what Richard Simeon has referred to as:

[t]wo central facts characteriz[ing] the relationship between federal and provincial governments. The first is that they are *interdependent*: functions and responsibilities are not neatly divided between Ottawa and the provinces. . . . Watertight compartments of sharply defined responsibilities no longer exist, if, indeed they ever did. The second fact is that governments are in some policy fields *autonomous*: none can dictate to the others. . . . Hence, in order to achieve coordination and collectively deal with the problems facing Canadians, governments must find ways to resolve conflicts, coordinate their activities, and jointly make policy. . . .²¹³

The example of trade in forest products given at the end of the federal-governance section and the alcoholic beverages case study completing the provincial powers section both support the dichotomy between interdependence and autonomy that Simeon identifies.

In Canada, cooperative or executive federalism,²¹⁴ or federal-provincial diplomacy²¹⁵ or whatever else we choose to call it, has been the preferred device for circumventing the limits of constitutionally divided autonomy in favour of mutual problem solving. The courts have facilitated such ventures by gradually lowering the barriers to interdelegation of governmental powers,²¹⁶ so much so as to qualify the original judicially imposed constitutional stricture prohibiting direct delegation (abdication) of legislative power²¹⁷ almost out of existence. Before any solutions are cast in statutory language, however, the broad terms are hammered out by executive decision makers in the forum of the federal-provincial conference; indeed, this meeting ground has been employed for resolving the largest constitutional issues of the day.²¹⁸ However, and increasingly in recent years, such meeting grounds have become political battlegrounds that do not always achieve what they were designed to accomplish.²¹⁹

Where cooperative efforts do not accommodate competing interests but simply provide a forum for confrontation between them, the federal-provincial conference falls short of being an "informal" constitutional mechanism in a different way than does judicial review of formal constitutional limitations; yet the effect is the same — and the problem remains. It appears that politicizing constitutional issues²²⁰ can prevent the achievement of workable solutions as readily as legalizing them might do.

Political disabilities lessen when the conference device is applied at levels of the political hierarchy below that of first ministers and may disappear entirely between mutually interested professionals in competing bureaucracies. The success of federal-provincial cooperation before and during the Tokyo Round negotiations under the GATT, which was canvassed in connection with the alcoholic beverages example given above, illustrates the continued utility of the exercise. Nevertheless, the same example also shows that something more may be called for than episodic cooperative exercises if the "solutions" to particular problems are to be ongoing. Continuity should be particularly important in the context of external trade policies that attempt to develop and retain Canada's competitiveness in international markets.

Institutionalizing Cooperation for Specific Tasks

External trade policy raises the same kinds of institutional problems that foreign policy does under a federal constitution, especially Canada's. "Clearly, coordination and consultation are needed between Ottawa and the provinces if 'national' policies are to be found and implemented."²²¹ What of cooperative federalism? In at least one important respect, intergovernmental cooperation on foreign policy has missed the mark. Michael Tucker stresses "the absence of long-term and coherent consultative mechanisms between federal and provincial functional departments concerned with the new areas in which responsibilities have overlapped, economic matters in particular."²²²

The problem appears to be that ad hoc cooperation works passably well during the course of the exercise, but its achievements begin to erode as soon as the cooperation comes to an end. The case of alcoholic beverages exemplifies the problem caused by intermittent flurries of cooperative problem solving. Canadian intergovernmental preparation for the Tokyo Round enabled the federal government to negotiate effectively with the GATT co-signatories who represented our most important foreign markets. Yet, much of the apparatus responsible for this success disappeared after the event, when perhaps it should have been retained in modified form to preserve the original understandings necessary for maintaining those policy achievements. Instead, returning to our one example, the provincial statement of intent on freedom of access to the alcoholic beverages market seems increasingly an empty gesture.

How might we avoid such outcomes? The trade policy difficulties on the alcoholic beverages issue might have been resolved before they reached the international arena by a permanent special committee consisting of federal officials apprised of national priorities and the concerns of Canada's trading partners, and similarly aware provincial bureaucrats representing local concerns, especially from sensitive market areas (Ontario, Quebec, British Columbia). Internal misunderstandings and

contradictory objectives between levels of government with respect to external trade should be addressed internally in advance of an occasion for international protest; otherwise, Canada will find it difficult to maintain coherence and credibility in its foreign trading relationships.

The solution I refer to at a micro level of analysis, D.A. Soberman describes in macro terms — as “Canada’s Institutional Deficit” — in relation to our central institutions of government, with particular emphasis on the failure of the Senate to provide a national forum for “useful participation of the provinces in those national decisions which substantially affect provincial responsibilities.”²²³ Soberman’s Senate reform proposal, among other similar proposals that he criticizes,²²⁴ outlines an ambitious and comprehensive objective that requires constitutional amendment. My proposal is much more specific and not so ambitious and does not necessitate any rewriting of our fundamental law. Nevertheless, the problem addressed, apart from its scale, is much the same.

Taking the European Economic Community’s (EEC’s) Committee of Permanent Representatives²²⁵ as his model, Soberman argues that “[t]he experience of the European Community has shown how valuable such long-term continuous contacts among senior civil servants can be.”²²⁶ He envisages a professional “secretariat” similar to the EEC Committee that would provide the necessary infrastructure to a new Council of the Federation. I suggest it might be useful to have mini-secretariats of federal and provincial officials to address the major external trade policies that straddle the federal division of powers. These minor institutions would merely report to their respective governments on an ongoing basis. With time, they could serve to channel bureaucratic minds onto complementary wavelengths, and, one hopes, this non-binding dialogue would influence political decision makers in a similar vein. At the same time, these joint committees could act as a focus and filter for non-governmental suggestions in Canada, evaluating, rationalizing and tabling private- and public-sector concerns for subsequent political consideration, having already placed them within a consensus-building framework.

These consultative bodies need not be particularly large or expensive to maintain. Each one could cover only one or a related group of industrial or market sectors dependent on international trade. The forest industry, for example, as I have explained,²²⁷ is doing for itself what, my proposal would suggest, that government might have done for the industry and the economic interests it represents, which, again, are largely dependent on foreign markets.

The larger the scale of the institutional response, the more unwieldy it becomes. Therefore, the nature of my proposal is best viewed as institutional incrementalism rather than unitary comprehensiveness across the entire field of activities embraced by external trade policy concerns.

Under an incremental approach, continuity would be assured only in specific fields. Still, the particularized infrastructures could easily be brought together for systematic review. The proposal has the added virtue that it could easily be tested in a single trading sector without the implementation of any grand design. In any event, wherever deficiencies in coordination have emerged, the modest initiative of creating specialized inter-bureaucratic mechanisms may prove very worthwhile.

Constitutional Amendment

The most direct response to perceived constitutional deficiencies is to amend them away, but the direct solution is also the most difficult to achieve. While one can quite easily compile an unfinished agenda for further constitutional reform in Canada,²²⁸ the trauma caused by the recent great effort²²⁹ that gave us the Charter (ss. 1 to 34), an amending formula (ss. 38 to 49) and more may leave little political stomach for further debate at the present time. Furthermore, the problems of external trade policy in areas of acknowledged provincial competence address jurisdictional prerogatives that no province will ever willingly relinquish. Moreover, much may be achieved simply by realizing the potential of our existing Constitution.

I do not mean to suggest by these reservations on the alternative of constitutional reform that Canadian foreign policy powers generally are not deserving of reform-minded scrutiny. Rather, it would appear that whatever reforms we can contemplate,²³⁰ they would not extend to the removal of all the problems that this analysis has identified.

The underlying premise of my analysis would commend greater federal power to enter into and secure international economic agreements to Canada's benefit. In support of this premise, "[i]t is widely believed that constitutional modifications tending to reduce the power of the federal Government of Canada . . . would be viewed negatively by the country's foreign trading and investment partners."²³¹ Realistically, however, the *Labour Conventions* barrier to unilateral federal implementation of treaty arrangements affecting provincial powers will only be removed in the wake of more basic constitutional revision which will facilitate the representation of regional and provincial concerns in the process of treaty making and ratification at the federal level.²³² This requirement usually suggests a reconstituted Upper House or Senate of elected representatives from the provinces, which would have the power to confirm or deny treaty arrangements put forward by the federal executive²³³ in much the same manner as does the U.S. Senate.²³⁴ Assuming those and other reforms could be implemented, it would be possible to avoid the problems suggested by both the failure to pursue the United Nations Convention on the International Sale of Goods and the alcoholic beverages example.

It can be argued that Parliament already possesses plenary legislative competence to regulate international trade, but it is also clear that the regulation of local trade can and does impinge significantly on the international sphere. Furthermore, unless there is radical constitutional reform of our central institutions of government, the problems of internally divided jurisdiction will persist with their international consequences. As I have attempted to demonstrate and as has been suggested elsewhere, solutions will depend on "[l]a mise en œuvre des mécanismes de collaboration intergouvernementale dans le domaine général des affaires extérieures."²³⁵

Assuming the existence of intergovernmental collaboration on international economic matters, a more modest constitutional initiative might involve the adoption of an enforcement clause with respect to federal-provincial understandings on which the maintenance of international obligations depend.²³⁶ In the case, for example, of the provincial statement of intent on alcoholic beverages tabled before the GATT,²³⁷ an enforcement clause would supposedly give the federal government the power to prevent the erosion of the original understanding on which Canada's trading partners have relied. Nevertheless, even if a sufficient political consensus would support such an amendment to the Constitution, the resulting provision could easily deter more intergovernmental cooperation than it guarantees, since the provinces might be less inclined to commit themselves *ab initio* to a possibly inflexible regime. Thus, if there had been an enforcement provision, the statement of intent, a good-faith undertaking only,²³⁸ might never have been forthcoming.

The fact remains that subsequent enforcement is no substitute for the initial task of facilitating and maintaining intergovernmental cooperation. The necessity of that task will linger. The principles of federalism become nuisances to uniform and effective policy-making in this regard, but ones that our polity has chosen to put up with, given the diverse character and aspirations of the Canadian federal state.

Concluding Observations

Constitutions are by nature inconvenient to politicians, and the Canadian Constitution is no exception to the rule. One consequence of our Constitution is that a coherent external trade policy is more difficult to achieve than it would be in the absence of certain constraints, express and implied, that characterize our fundamental law. For the senior umpire of Canadian federalism it means further that "however worthy the policy objectives, it must be recognized that we, as a Court, are not given the freedom to choose. . . . [Rather] [,] [w]e must seek to give effect to the Constitution as we understand it and with due regard for the manner in which it has been judicially interpreted in the past."²³⁹ Due

regard for the past, however, does not constitutionally require judges, or politicians for that matter, to be governed uncritically by what has gone before.²⁴⁰

From one perspective it is said that "[t]he constitutional approach, with its structural emphasis, fails to explain political behaviour."²⁴¹ Therefore, "[t]he construction of more adequate explanations requires a fresh perspective" which, *inter alia*, appreciates factors that are apparently overlooked by a structural analysis.²⁴² A second perspective takes issue with the first and emphasizes the study of governmental institutions as an independently valid explanatory tool. It argues that these mechanisms cannot be understood merely as a product of the socio-political forces shaping the Canadian federal state, they become a determinative element influencing the political environment into which they are introduced.²⁴³ My analysis has been premised on the validity of this second point of view.

The constitutional division of powers defined by our courts discloses a broader basis for a nationally determined external trade policy than conventional legal or political wisdom would normally admit. Apart from the hazards of constitutional amendment, it remains worthwhile to realize the potential of our Constitution within its original terms, thus enhancing its credibility as an enduring mandate for the Canadian polity. The fact that this potential is not usually recognized may be the result of unnecessarily restrictive and conclusory legal thinking or, what is perhaps more likely, of political and bureaucratic fumbling obscured by claims of reliance on alleged constitutional limitations. Nevertheless, it is also true that the written Constitution does impose manifest inconveniences on federal authorities, inevitably transcending orderly jurisdictional confinement to a single level of government actors.

Participants in political governance who ignore the legal aspects of constitutional governance do so at their peril. In any event, when political consensus breaks down, one side or another will probably invoke the judicial protection of constitutionally prescribed jurisdictional entitlements in defence of what is otherwise politically indefensible. Institutionalizing the channels of intergovernmental participation and cooperation made necessary by our constitutional structure promises to help defuse political controversies that lead to legal confrontation. Resort to judicial determinations cannot always be avoided; nor should we wish that it could. Legal clarification of constitutional limitations may serve to extend the scope of permissible political activity under existing doctrine; as well, it may serve to confine it. In this respect, there is some basis for optimism that judicial thinking is becoming more appreciative of concerns relevant to an effective external trade policy for the Canadian nationstate.

Legal imagination need not necessarily suggest a contradiction in terms, notwithstanding the greater exuberance of its political counter-

part. The realm of constitutional principle invites constructive incremental improvement to its edifice without sacrificing the integrity of the original structure.

Notes

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1. The scholarship of W.R. Lederman provides perhaps the most insightful legal treatment we have of this troublesome dichotomy. See e.g., "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada," in *The Future of Canadian Federalism* (P.A. Crepeau and C.B. Macpherson, eds.) (1965, p. 91); "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 *Can. Bar Rev.* 597. See also F.R. Scott, "Centralization and Decentralization in Canadian Federalism" (1951), 29 *Can. Bar Rev.* 1095.
2. Cf., R.E. Haack et al., *The Splintered Market* (1981); F.R. Flatters and R.G. Lipsey, *Common Ground for the Canadian Common Market* (1983); A.E. Safarian, *Canadian Federalism and Economic Integration* (1974); G. Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity* (2d ed., 1982). See especially Government of Canada, *Powers Over the Economy: Securing the Economic Union in the Constitution*, discussion paper submitted by the Honourable J. Chrétien to the Continuing Committee of Ministers on the Constitution (Doc. 830-81/036, July 9, 1980).
3. "Legal answers are of value only in the solution of legal problems. And federalism is concerned with many other problems than those of a legal nature." W.S. Livingston, *Federalism and Constitutional Change* (1956), p. 1.
4. The judicial role of umpire in the Canadian federal structure was assumed from the beginning. See W.R. Lederman, Book Review (1970-71), 16 *McGill L.J.* 723, pp. 725-27. It has now a twofold textual guarantee in the *Constitution Act, 1982*, ss. 24 and 52.
5. Professor Alan Cairns has explained intergovernmental negotiation and cooperation that are directed to the amelioration of constitutional limitations on governmental power as arrangements amounting to an "informal constitution," an account of which may be more instructive than the reference points of text and case law traditionally resorted to by constitutional lawyers (oral comments at a meeting of Section III (Canadian Economic Union) of the Royal Commission on the Economic Union and Development Prospects for Canada, held at Ottawa, December 1, 1983). Informal alternatives to formal confrontation, indeed, can be very helpful. Federal-provincial consultation and informal provincial participation in federal treaty making provides one example illustrated by the precedent of the Columbia River Treaty. For discussion see C. Bourne, "The Columbia River" (1959), 37 *Can. Bar Rev.* 444; M. Cohen, "The Columbia River Treaty, A Comment" (1962), 8 *McGill L.J.* 212; "The Columbia River Treaty and Protocol" (1964), 16 *External Affairs* 98; see generally A. Gotlieb, *Canadian Treaty-Making* (1968).

However, to give such arrangements a "constitutional" label is misleading in relation to our fundamental law. Rather, they are best described as extra-or non-constitutional in character, since neither level of government is trenching on the other's authority. Where a conflict does arise, informal arrangements provide no basis for constitutional argument, although they may indicate a need for structural revision in the form of a constitutional amendment.

6. Here, I accept Smiley's proposition that "[i]n the most general sense the imperatives of economic nationhood require that one set of governmental authorities have the capacity to speak for and to commit the nation in international affairs." D. Smiley, *Canada in Question: Federalism in the Eighties* (3d ed., 1980), p. 202.

7. *Constitution Act, 1867*, preamble; formerly the *British North America Act, 1867*, 30–31 Vict., c. 3 (U.K.), renamed by the *Constitution Act, 1982*, Sch. Item No. 1. See 6 *Halsbury's Laws of England*, p. 427 et seq. (1909).
- Canada formally acquired international personality pursuant to the *Statute of Westminster, 1931*, 22 Geo. V, c. 4 (U.K.). A majority of the Supreme Court of Canada has confirmed that his document merely "sanctified" practical recognition of international personality as early as 1923. *Reference Re Amendment of the Constitution of Canada* (Nos. 1, 2, and 3), [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1, p. 44 (per Laskin C.J.C., Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.).
8. Preamble paragraph of s. 91.
9. See generally G.P. Browne, *The Judicial Committee and the British North America Act* (1967).
10. Cf. M.R. MacGuigan, "Precedent and Policy in the Supreme Court of Canada" (1967), 45 *Can. Bar Rev.* 627.
11. Cf. B. Laskin, "Peace Order and Good Government Re-Examined" (1947), 25 *Can. Bar Rev.* 1054; G.V. La Forest, "The Labour Conventions Case Revisited" (1974), 12 *Can. Yrbk. Int'l. L.* 137.
12. Agreement Between Canada and the United States Concerning Automotive Products, done at Johnson City, Texas, January 16, 1965, in force, September 16, 1966, [1966] Can. T. S. No. 14; 6 UST 6231; TIAS 3474; 247 UNTS 163.
13. General Agreement on Tariffs and Trade, done at Geneva, October 30, 1947, in force, January 1, 1948, 55–61 UNTS 194. For consolidation of the GATT as amended see The Contracting Parties To the General Agreement on Tariffs and Trade, 4 *Basic Instruments and Selected Documents* (Geneva, 1969). For discussion see D.S. Macdonald, "Canadian Industrial Policy Objectives and Article III of GATT: National Ambitions and International Obligations" (1982), 6 *Can. Bus. L.J.* 385; E.F. Carasco, "The Foreign Investment Review Agency (FIRA) and the General Agreement on Tariffs and Trade (GATT): Incompatible?" (1983), 13 *Georgia J. Int'l & Comp. L.* 441.
14. It could not, we are told, because "[s]ection 132 . . . is a provision whose literal terms have been overtaken by events from which there is no turning back . . . It is, hence, obsolete, unless its words are tortured to meet the present international position, and this is too much to expect from the Courts." B. Laskin, *Canadian Constitutional Law* (3d ed., 1966), p. 290.
15. *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C.); *Re Regulation and Control of Radio Communications in Canada* (Radio Reference), [1932] A.C. 304 (P.C.).
16. *A.-G. Can. v. A.-G. Ont. (Labour Conventions)*, [1937] A.C. 326 (P.C.).
17. *References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act and the Limitation of Hours of Work Act*, [1936] S.C.R. 461, [1936] 3 D.L.R. 673. Rinfret, Cannon and Crockett JJ. rejected the legislation, but Duff C.J., Davis and Kerwin JJ. found that "[a]s regards all such international arrangements, it is a necessary consequence of the respective positions of the Dominion executive and the provincial executives that this authority resides in the Parliament of Canada." *Ibid.*, p. 488 S.C.R., p. 690 D.L.R.
18. [1937] A.C. 326, p. 351 (P.C.).
19. *Ibid.*, p. 354.
20. Browne, *supra*, note 9, p. 22.
21. For a representative sampling of the vast literature see G.L. Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967), 45 *Can. Bar Rev.* 478; R.St.J. Macdonald, "International Treaty Law and the Domestic Law of Canada" (1975), 2 *Dalhousie L.J.* 307; F.R. Scott, "The Consequences of the Privy Council Decisions" (1937), 15 *Can. Bar Rev.* 485; G.J. Szablowski, "Creation and Implementation of Treaties in Canada" (1956), 34 *Can. Bar Rev.* 28; and La Forest, *supra*, note 11.
22. Lord Wright, "In a Tribute to Rt. Hon. Sir Lyman Poore Duff, G.C.M.G." (1955), 33 *Can. Bar Rev.* 1123, p. 1127.
23. [1956] S.C.R. 618, 3 D.L.R. (2d) 641.

24. *Reference Re Ownership of Off-Shore Mineral Rights*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353 (Subsequent page references are to 65 D.L.R. (2d)).
25. In obiter, the Court commented, pp. 376, 380:
 Moreover, the rights in the territorial sea arise by international law and depend upon recognition by other sovereign States. Legislative jurisdiction in relation to the lands in question belongs to Canada which is a sovereign State recognized by international law and thus able to enter into arrangements with other States respecting the rights in the territorial sea. . . .
 [Concerning the continental shelf, the Court reiterated that] Canada is the sovereign State which will be recognized by international law as having the rights stated in the Convention of 1958, and it is Canada, not the Province of British Columbia, that will have to answer the claims of other members of the international community for breach of obligations and responsibilities imposed by the Convention. . . .
26. *The Queen v. Keyn* (1876), 2 Ex. D. 63.
27. I. Head, "Canadian Offshore Minerals Reference" (1968), 18 *U. Toronto L.J.* 131, pp. 155-56.
28. *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, pp. 167-72; 66 D.L.R. (3d) 1, pp. 27-31. (Subsequent page references are to 66 D.L.R. (3d)).
29. *Commonwealth of Australia v. State of Tasmania (Franklin River Dam)* (1983), 46 A.L.R. 625 (H.C.).
30. This was the position taken by the Honourable Mark MacGuigan, former Minister of Justice in his address to participants (including this writer) in a Department of Justice-sponsored *International Trade Law Seminar*, held at Ottawa, October 20, 1983. See Canada, Department of Justice, *First International Trade Law Seminar: Proceedings* (1983), 48, at p. 52.
31. *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.).
32. *Ibid.*, pp. 8-14; 42-60.
33. *Ibid.*, pp. 59-60 citing *inter alia* the *Constitution Act, 1867*, ss. 92(13), 92A(1).
34. *Ibid.*, p. 59. Viz. provincial extraterritorial competence see G.V. La Forest, "May the Provinces Legislate in Violation of International Law?" (1961), 39 *Can. Bar Rev.* 78.
35. *Reference Re Mineral and Other Natural Resources of the Continental Shelf (Newfoundland Reference)* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.).
36. The Supreme Court of Canada, *supra*, note 31, p. 392 mentions that while notices of appeal have been filed on both sides, "[n]othing further has been done to bring these appeals before this Court."
37. *Constitution Act, 1867*, s. 91, preamble paragraph.
38. *Ibid.*
39. La Forest, *supra*, note 11, p. 145.
40. *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C.).
41. *Pronto Uranium Mines v. Ontario Labour Relations Board*, [1956] O.R. 862, 5 D.L.R. (2d) 342.
42. *Schneider v. The Queen*, [1982] 2 S.C.R. 112, 139 D.L.R. (3d) 417 (upholding the *Heroin Treatment Act*, S.B.C. 1978, c. 24); *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193.
43. *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, p. 524.
44. See e.g., the statement of Attorney-General Macdonald in *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces*, 8th Prov. Parl., 3rd Sess. (1865), p. 40.
45. *A-G. Ont. v. A-G. Can. (Local Prohibition)*, [1896] A.C. 348 (P.C.), p. 361.
46. See discussion of UN Convention on the International Sale of Goods, *infra*, notes 107 to 119 and accompanying text.

47. *Cf. Schneider v. The Queen*, *supra*, note 42.
48. Mr. Justice Rand thought that a general writ under POGG was supportable, as did Lord Wright before him, but his proposition has gone nowhere since, nor is it likely to in the conceivable future. See I.C. Rand, "Some Aspects of Canadian Constitutionalism" (1960), 38 *Can. Bar Rev.* 135, at pp. 142–43; acc. Lord Wright, *supra*, note 22.
49. Following Lord Sankey in *Edwards v. A.-G. Can.*, [1930] A.C. 124, p. 136; [1930] 1 D.L.R. 98, pp. 106–107 (P.C.): "The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits."
50. Even harsh critics have conceded that the decision remains consistent with political realities; and is neither seriously debilitating on its own nor a precedent necessity compels us to forsake. E.g. Morris, *supra*, note 21, at pp. 491, 503–12.
51. Per Lord Atkin, *supra*, note 16, at p. 352.
52. Sir Montague Smith summarized the approach as follows in *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96, p. 109 (P.C.):

In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree, and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature, . . . It could not have been the intention that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified by that of the other.

Cf. Lederman, "The Balanced Interpretation," *supra*, note 1; Laskin, "Tests for the Validity of Legislation: What's the Matter?" (1955–56), 11 *U. Toronto L.J.* 114.
53. *Parsons*, *ibid.*, p. 113.
54. *Cf. Lord Sankey's* metaphor of a "living tree," in *Edwards*, *supra*, note 49.
55. *Parsons*, *supra*, note 52. p. 113.
56. *Aeronautics*, *supra*, note 40, and *Pronto Uranium*, *supra*, note 41.
57. *Constitution Act, 1867*, 30–31 Vict. c. 3 (U.K.), s. 121.
58. *Cf. statement of Attorney-General MacDonald on the Quebec Resolutions*, *supra*, note 44, pp. 33, 40:

We have strengthened the General Government. We have given the General Legislature all the great subjects of legislation. . . . We have avoided all conflict of jurisdiction and authority. . . .

Of course too, [Parliament] must have the regulation of trade and commerce. . . .
59. *Reference Re The Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257, p. 265.
60. *Cf. Lederman*, "The Balanced Interpretation," *supra*, note 1; and his "The Concurrent Operation of Federal and Provincial Laws in Canada" (1962–63), 9 *McGill L.J.* 185.
61. *A.G.-Man. v. Manitoba Egg and Poultry Assn.*, [1971] S.C.R. 689; 19 D.L.R. (3d) 169; *Burns Foods Ltd. v. A.G.-Man.*, [1975], 1 S.C.R. 494; 40 D.L.R. (3d) 731; *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545; 80 D.L.R. (3d) 449 (subsequent references are noted as CIGOL); *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42; 88 D.L.R. (3d) 609.
62. *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844; 106 D.L.R. (3d) 581; *Reference Re Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1, [1949] 1 D.L.R. 433; *affd* [1951] A.C. 179 (P.C.).
63. *The King v. Eastern Terminal Elevator Co.*, [1925] S.C.R. 434; [1925] 3 D.L.R. 1. (Subsequent page references are to [1925] S.C.R.).
64. *Ibid.*, pp. 446–47.
65. *Ibid.*
66. *Ibid.*, p. 447.

67. *Reference Re Natural Products Marketing Act*, [1936] S.C.R. 398; [1936] 3 D.L.R. 622; *affd sub nom. A.-G. B.C. v. A.-G. Can. (Natural Products Marketing)*, [1937] A.C. 377; [1937] 1 D.L.R. 691 (P.C.).
68. [1937] A.C. 377, p. 410.
69. *Caloil Inc. v. A.-G. Can.*, [1971] S.C.R. 543; 20 D.L.R. (3d) 472 (upholding valid federal prohibition on sale of imported oil west of the Ottawa Valley); *Murphy v. C.P.R.*, [1958] S.C.R. 626; 15 D.L.R. (2d) 145 (validity of *Canadian Wheat Board Act* re compulsory purchasing of grain destined for extraprovincial markets sustained); *R. v. Klassen* (1959), 20 D.L.R. (2d) 406; 29 W.W.R. 369 (Man. C.A.) leave to appeal to Supreme Court of Canada refused November 30, 1959 (*Canada Wheat Board Act* upheld in application to a local work).
70. *CIGOL*, *supra*, note 61; *Central Canada Potash*, *supra*, note 61.
71. *Carnation Co. Ltd. v. Que. Agricultural Marketing Bd.*, [1968] S.C.R. 238; 67 D.L.R. (2d) 1 (upholding constitutionality of provincial marketing plan fixing minimum prices for milk paid to local producers). (Subsequent page references are to 67 D.L.R. (2d)).
72. In evaluating the challenged validity of the Quebec milk marketing scheme in the *Carnation* case, *ibid.*, Martland J. for the Court reasoned as follows at pp. 14–15:

Are these orders invalid because the milk purchased by the appellant was processed by it and, as to a major portion of its product, exported from the province? . . .

That the price determined by the orders may have a bearing upon the appellant's export trade is unquestionable. It affects the cost of doing business . . .

I am not prepared to agree that . . . the fact that these orders may have some impact upon the appellant's interprovincial trade necessarily means that they constitute a regulation of trade and commerce. . . .

In the present case, the orders under question were not, in my opinion, directed at the regulation of interprovincial trade. . . . The most that can be said of them is that they had some effect upon the cost of doing business in Quebec of a company engaged in interprovincial trade, and that, by itself, is not sufficient to make them invalid.
73. See *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; 84 D.L.R. (3d) 257 (federal adjustment levies and quotas on local production of eggs *ultra vires*). (Subsequent page references are to 84 D.L.R. (3d).) Pigeon J. for the majority concluded at p. 325:

I can find no basis for the view that there must be a division of authority at the stage of production between what will be going into intraprovincial and what will be going into extraprovincial trade. . . .

Under the present circumstances such farms are, like any other farms, local undertakings subject to provincial authority, irrespective of the destination of their output. . . .
74. E.g., in *Reference Re Agricultural Products Marketing Act*, *ibid.*, p. 325, Pigeon J. points out: "We are not called upon to decide in the present case whether the federal Parliament could assume control over egg farms devoted exclusively to the production of eggs for extra-provincial trade."
75. *Dominion Stores Ltd. v. The Queen*, *supra*, note 62, Estey J. for the majority; Laskin C.J.C. with Ritchie, Dickson and McIntyre JJ. concurring in dissent. (Subsequent page references are to 106 D.L.R. (3d)).
76. *Ibid.*, pp. 598–99, *per* Estey J. (Martland, Pigeon, Beetz and Pratte, JJ. concurring):

It is not necessary to determine, in my view, whether Part 1 [of the *Canada Agricultural Products Standards Act*, R.S.C. 1970, c. A.-8] is *ultra vires* the Parliament of Canada *in toto*. . . . It is sufficient if it is found to be inapplicable to the events as alleged. . . . [I]n my view, s. 3 has no validity in relation to purely intraprovincial transactions and in that respect is *ultra vires*.
77. See and compare the *Caloil* and *Murphy* cases, *supra*, note 69 with the *Eastern Terminal* case, *supra*, note 63, and the *Carnation* case, *supra*, note 71.
78. For a strong argument favouring notions of interdependence over arbitrary and dated distinctions between international and local economic regulation, see I. Bernier, "La

Constitution canadienne et la réglementation des relations économiques internationales au sortir du "Tokyo Round" (1979), 20 *Cah. de D.* 673. Professor Bernier concludes at p. 691:

De plus en plus, celles-ci perçoivent le caractère relativement factice de la distinction traditionnelle entre économie externe. . . . Faut-il en conclure alors que les provinces devraient s'effacer graduellement du domaine de la réglementation économique en général? Rien n'est moins certain.

79. *Parsons*, *supra*, note 52, p. 113.
80. *John Deere Plow Co. v. Wharton*, [1915] A.C. 330; 18 D.L.R. 353 (P.C.), (subsequent page references are to [1915] A.C.).
81. *A.-G. Ont. v. A.-G. Can. (Canada Standard Trade Mark)*, [1937] A.C. 405; [1937] 1 D.L.R. 702 (P.C.).
82. *John Deere Plow Co. v. Wharton*, *supra*, note 80, p. 340 (*per Visc. Haldane L.C.*): "For if it be established that the Dominion Parliament can create such companies, then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade."
83. *Re Board of Commerce Act and Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456; 54 D.L.R. 354.
84. For discussion see G. LeDain, "Duff and the Constitution" (1974), 12 *Osgoode Hall L.J.* 261, pp. 293-308.
85. See *supra*, note 63, and accompanying text.
86. *Labatt Breweries of Canada Ltd., v. A.-G. Can.*, [1980] 1 S.C.R. 914; 110 D.L.R. (3d) 594, *per Estey J.*, Martland, Dickson, Beetz and Pratte JJ., concurring. (Subsequent page references are to 110 D.L.R. (3d).)
87. *Food and Drugs Act*, R.S.C. 1970, c. F-27, s. 6; *Food and Drug Regulations*, C.R.C., c. 870, s. B.02.134.
88. *Supra*, note 86, p. 623.
89. *A.-G. Can. v. Canadian National Transportation Ltd.* (1983), 3 D.L.R. (4th) 16; 49 N.R. 241 (S.C.C.). (Subsequent page references are to 49 N.R.)
90. *R. v. Hauser*, *supra*, note 42.
91. R.S.C. 1970, c. C-23, s. 32(1)(c).
92. *Supra*, note 89 at pp. 245-64 (Ritchie, Estey and McIntyre JJ., concurring).
93. *Ibid.*, pp. 264-85, *per Dickson J.* (Beetz and Lamer JJ., concurring).
94. (1983), 49 N.R. 286; 2 D.L.R. (4th) 577 (S.C.C.), *per Laskin C.J.C.*, Ritchie, Estey and McIntyre JJ., concurring; Beetz and Lamer JJ., concurring in the result. (Subsequent page references are to 2 D.L.R. (4th)).
95. *Ibid.*, pp. 582-97, *per Dickson J.*, dissenting.
96. See, *supra*, note 88, and accompanying text.
97. *Supra*, note 89, p. 276.
98. *Ibid.*
99. *Ibid.*
100. *Ibid.*
101. [1977] 2 S.C.R. 134; 66 D.L.R. (3d) 1, p. 25.
102. R.S.C. 1970, c. T-10, s. 7(e) (providing for a civil cause of action absent a federal regulatory scheme).
103. *Supra*, note 89, p. 277, *per Dickson J.* citing Laskin C.J.C. in *MacDonald v. Vapor*.
104. *Ibid.*, p. 277.
105. *Ibid.*, pp. 277, 279-83.
106. Journalistic comment on the impact of Dickson's appointment was cautionary: Dickson's promotion won virtually unanimous approval from judges and lawyers across the country who have admired his gentle courtesy and clearly drafted judgments. . . . It is less easy to foresee whether Dickson will dominate the court as Laskin

seemed to try to do — but often failed. Dickson might well be more successful in quietly building a consensus around his views. Dickson himself said [on the occasion of his appointment] that Supreme Court judges are proudly independent: “The Chief Justice may preside at discussions but he doesn’t dominate.” J. Hay, “The New Face of the Law” *Maclean’s*, vol. 97, April 30, 1984, 10, at pp.10, 11.

107. E.g., the work of the United Nations Conference on Trade and Development (UNCTAD) *viz.* restrictive business practices and transfer of technology between developed and developing countries. See UNCTAD, *Restrictive Business Practices*, UN Doc. TD/B/C. 2/104/Rev. 1 (1971); UNCTAD, *Restrictive Business Practices in Relation to the Trade and Development of Developing Countries*, UN Doc. TD/B/C. 2/119/Rev. 1 (1974); UNCTAD, *The Possibility and Feasibility of an International Code of Conduct of Transfer of Technology*, UN Doc. TD/CODE TOT/25 May 6, 1980. For a recent analysis of the Draft Code of Conduct, see H.S. Fairley and P.J. Rowcliffe, “The UNCTAD Code of Conduct for the International Transfer of Technology: Problems and Prospects” (1980), 18 *Can. Yrbk. Int’l. L.* 218. See generally B. Gosovic, *UNCTAD: Conflict and Compromise* (1972); C.K. Wilber, *The Political Economy of Development and Underdevelopment* (1973).
108. See UN Doc. A/CONF. 97/18, Annex I, GAOR, A/CONF. 97/19, 178 (1981).
109. Ten ratifications are required prior to the Convention coming into force pursuant to CISG, art. 99.
110. As of December 31, 1981, 31 states had signed the Convention. See *Multilateral Treaties Deposited with the Secretary-General*, UN Doc. ST/LEG/SER. E/1, 307 (1982).
111. See generally J.O. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention* (1982); G. Eorsi, “A Propos the 1980 Convention on Contracts for the International Sale of Goods” (1983), 31 *Am. J. Comp. L.* 333; J.S. Ziegel, “The Vienna International Sales Convention,” in *New Dimensions in International Trade Law: A Canadian Perspective* (Ziegel and Graham, eds.) (1982).
112. J.S. Ziegel, “Should Canada Adopt the International Sales Convention?” in *Meredith Memorial Lectures: New Developments in the Law of Export Sales*, Faculty of Law, McGill University (1982), p. 67 *et seq.* (hereinafter cited as *Meredith Lectures*).
113. This observation is based on impressions gained by the author from the comments of federal Department of Justice officials *viz.* Canadian interest in the CISG at a seminar sponsored and conducted by the Department of Justice, on International Trade Law, held at Ottawa, October 20, 1983. *Cf.* Ziegel, *Meredith Lectures*, *supra*, note 112, pp. 76–83.
114. See J. Ziegel and C. Samson, *Report to the Uniform Law Conference of Canada on the Convention on Contracts for the International Sale of Goods* (Ottawa, July 1981, mimeo).
115. See Uniform Law Conference of Canada, *Proceedings*, 63rd Annual Meeting, August 1981, (1981), p. 34.
116. *Supra*, notes 63 to 68 and accompanying text.
117. *Supra*, note 103 and accompanying text.
118. *Supra*, note 104 and accompanying text.
119. CISG, art. 93, which states in part:
 - (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time. . . .
 - (4) If a Contracting State makes no declaration under paragraph (1) of this article, the Convention is to extend to all territorial units of that State.
120. See *Certain Softwood Products from Canada*, 47 Fed. Reg. 49876 (October 7, 1982).
121. Tariff Act of 1930, 19 U.S.C.A. 1671–1677g.

122. 47 Fed. Reg. 49878 (October 27, 1982).
123. See *Softwood Lumber from Canada*, Inv. No. 701-TA-1978 (Preliminary), USITC Pub. 1320 (November 1982), 47 Fed. Reg. 54183 (December 1, 1982); *Softwood Shakes and Shingles from Canada*, Inv. No. 701-TA-198 (Preliminary), USITC Pub. 1321 (November 1982), 47 Fed. Reg. 54185 (December 1, 1982); *Softwood Fence from Canada*, Inv. No. 701-TA199 (Preliminary), USITC Pub. 1322 (November 1982), 47 Fed. Reg. 54188 (December 1, 1982).
124. *Certain Softwood Products from Canada*, 47 Fed. Reg. 56683 (December 9, 1982).
125. *Certain Softwood Products from Canada*, 48 Fed. Reg. 10395 (March 11, 1983).
126. *Ibid.*, p. 10402.
127. *United States Coalition for Fair Canadian Lumber Imports v. United States of America et al.*, statement of claim filed March 21, 1983, United States Court of International Trade Court No. 83-3-00414.
128. Declaration of Gary N. Horlick, Deputy Assistant Secretary for Import Administration, International Trade Administration, United States Department of Commerce, dated March 28, 1983, designated exhibit "A," attached to defendant's opposition to plaintiff's motion, which states, p. 3:

There are ten Import Administration case analysts working on a daily basis on the instant investigations. None of these analysts is available at the present time, because they are currently in Canada conducting the verification of material submitted in these investigations as required by the countervailing duty statute.
129. *Supra*, note 125, pp. 10397-402.
130. Based on information given to the author from sources at the Department of Justice, Ottawa. Personal interview, March 2, 1984. The file was considered "active" by the Department of Justice throughout March and April 1983.
131. *United States Coalition for Fair Canadian Lumber Imports v. United States of America et al. and Canadian Softwood Lumber Committee*, memorandum opinion and order dated March 31, 1983 per Boe J., U.S. Court of International Trade No. 83-300414.
132. The motion to intervene was allowed in conjunction with the hearing on the order to show cause in the U.S. Court of International Trade on March 30, 1983. According to the memorandum opinion and order of Boe J., it was granted the same day. No discussion of standing appears in the order.
133. Motions to dismiss granted, U.S. Court of International Trade, Slip Op. 83-31, dated April 13, 1983, Court No. 83-3-00414.
134. *Certain Softwood Products from Canada Final Negative Countervailing Duty Determinations*, 48 Fed. Reg. 24159 (May 31, 1983).
135. Description based on information obtained from the Department of Justice, Ottawa (telephone communications, March 6 and 22, 1984); Ontario Lumber Manufacturers Association, Toronto (telephone communication, March 22, 1984); Council of Forest Industries, Vancouver (telephone communication, March 23, 1984).
136. See D. Stewart Patterson, "New Umbrella Organization to Represent 16 Forest Groups," *The Globe and Mail*, March 14, 1984, p. B-19, col. 1.
137. Department of Justice sources, *supra*, note 130, confirm that their file on the countervailing duties case contained no information on the identity of the Canadian Softwood Lumber Committee or on its principal objectives in the litigation.
138. Source: Mr. D. Lanskill, President, Council of Forest Industries, *supra*, note 135.
139. For a current critique of jurisdictional problems in the field see R.A. Fashler and A.R. Thompson, "Constitutional Change and the Forest Industry" in 2 *Canada and the New Constitution The Unfinished Agenda* 55 (S.M. Beck and I. Bernier eds., 1983).
140. See W.F. Schwartz, "The Social Costs of Intervention," in *Non-Tariff Barriers After the Tokyo Round* (J. Quinn and P. Slayton, eds.) (1982), p. 79.
141. For arguments that provincial executive powers in foreign relations should complement legislative jurisdiction, see J. Brossard, A. Patry, and E. Weiser, *Les pouvoirs*

- extérieurs du Québec* (1967). Cf. *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.). See generally T. Levy, "Provincial International Status Revisited" (1976), 3 *Dalhousie L.J.* 70.
142. Most provincial activity has been directed to the furtherance of economic linkages with the United States. See S. Clarkson, *Canada and the Reagan Challenge* (1982), pp. 302–10; P.R. Johansson, "Provincial International Activities" (1978), 33 *Int'l. J.* 357; K. Holsti and T. Levy, "Bilateral Institutions and Transgovernmental Relations Between Canada and the United States" (1974), 28 *Int'l. Org.* 875.
 143. See *A.-G. Ont. v. Scott*, [1956] S.C.R. 137, p. 143, *per* Rand J.; for comment, see B. Laskin, "*Attorney General for Ontario v. Scott*" (1956), 34 *Can. Bar Rev.* 215.
 144. Cf. the statement of Lord Atkin in *Labour Conventions*, *supra*, note 16, pp. 353–54:
It must not be thought that the result of this decision is that Canada is incompetent to legislate in performance of treaty obligations. In totality of legislative powers, Dominion and Provincial together, she is fully equipped. But the legislative powers remain distributed. . . .
 145. *Supra*, note 89, p. 275.
 146. Cf. *Interprovincial Co-operatives Ltd. v. The Queen in Right of Manitoba*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321 (*Fisherman's Assistance and Polluters' Liability Act*, R.S.M. 1970, c. F-100, *ultra vires* as applied to out-of-province tortfeasors viz. pollution damage in Manitoba). For criticism, see H.S. Fairley, "Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect" (1978), 10 *Ottawa L. Rev.* 253, pp. 267–71.
 147. *Burns Foods Ltd. v. A.-G. Man.*, *supra*, note 61.
 148. *Carnation Co. Ltd. v. Que. Agricultural Marketing Bd.*, *supra*, note 71; *Reference Re Agriculture Products Marketing Act*, *supra*, note 73.
 149. *R. v. Klassen*, *supra*, note 69.
 150. *The King v. Eastern Terminal Elevator Co.*, *supra*, note 63.
 151. *Carnation Co. Ltd. v. Que. Agricultural Marketing Bd.*, *supra*, note 71, *per* Maitland J., pp. 14–15.
 152. E.g., in regulating the distribution and sale of imported fossil fuels Cf., *Caloil Inc. v. A.-G. Can.*, *supra*, note 69.
 153. Cf. statement of Estey J. in the *Dominion Stores Ltd. v. The Queen*, *supra*, note 62 at p. 598.
 154. *Supra*, notes 89–93 and accompanying text.
 155. By s. 92(2) of the *Constitution Act, 1867*, provincial tax jurisdiction is limited to "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes," as opposed to the power of Parliament to raise by s. 91(3) "Money by any Mode or System of Taxation" it chooses. Our courts have adopted J.S. Mill's classic formulation of a direct tax as: "one which is demanded from the very person who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another. . . ." J.S. Mill, *Principles of Political Economy*, Book V, Chap. 2 (1848). See *Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575; G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* 78 (2d ed., 1981).
 156. Customs and excise are a fully occupied federal field pursuant to s. 91(3); e.g., *Customs Act*, R.S.C. 1970, c. C-40; the *Customs Tariff*, R.S.C. 1970, c. C-41; *Excise Act*, R.S.C. 1970, c. E-12; *Excise Tax Act*, R.S.C. 1970, c. E-13. It has also been suggested that customs duties fall under s. 91(2) to the extent they are not reachable under s. 91(3); see *A.-G. B.C. v. A.-G. Can. (Johnny Walker Reference)*, [1924] A.C. 222 (P.C.).
 157. See *B.C. Elec. Ry. Co. v. The King*, [1946] A.C. 527; [1946] 2 D.L.R. 81 (P.C.).
 158. *A.-G. Alta. v. A.-G. Can. (Bank Taxation Case)*, [1939] A.C. 117; [1938] 4 D.L.R. 433 (P.C.); *Texada Mines v. A.-G. B.C.*, [1960] S.C.R. 713; 24 D.L.R. (2d) 81.
 159. See the *CIGOL* and *Central Canada Potash* cases, *supra*, note 61.

160. On the constitutionality of provincial sales taxes as "direct" taxation see *A.G.-B.C. v. Kingcombe Navigation Co.*, [1934] A.C. 45 (P.C.); *Atlantic Smoke Shops v. Conlon*, [1943] A.C. 550 (P.C.); *Cairns Construction v. Government of Saskatchewan*, [1960] S.C.R. 619; 24 D.L.R. (2d) 1.
161. *Constitution Act, 1867*, s. 92A, added by the *Constitution Act, 1982*, s. 50. For discussion, see W.D. Moull, "Section 92A of the Constitution Act, 1867" (1983), 61 *Can. Bar Rev.* 715; J.B. Ballem, "Oil and Gas Under the New Constitution" (1983), 61 *Can. Bar Rev.* 547.
162. Moull, *ibid.*, p. 723.
163. *Ibid.*, pp. 728-30.
164. *Ibid.*, p. 729.
165. *Ibid.*, p. 730-31.
166. Section 92A(3) provides:
 - (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
167. For a recent account of the pitfalls encountered in applying the doctrine of paramountcy, see E. Colvin, "Legal Theory and the Paramountcy Rule" (1979-80), 25 *McGill L.J.* 82.
168. *Russell v. The Queen* (1881-82), 7 App. Cas. 829; 2 Cart. 12 (P.C.).
169. La Forest, *supra*, note 155, pp. 157-59.
170. *A.-G. Ont. v. A.-G. Can.* (Local Prohibition), [1896] A.C. 348; *A.-G. Ont. v. Can. Temperance Federation*, [1946] A.C. 193.
171. La Forest, *supra*, note 155, p. 162.
172. See J.A. Finlayson, *Canada and the International Political Economy*, Parts I and II (unpublished mimeo, Ottawa, 1983), p. 37.
173. See, e.g., *Consumer Protection Act*, R.S.O. 1980, c. 87; *Public Health Act*, R.S.O. 1980, c. 534; *Wool Marketing Act*, R.S.O. 1980, c. 538.
174. See K. Stegemann and K. Acheson, "Canadian Government Purchasing Policy" (1972), 6 *J. World Trade L.* 442.
175. Government of Canada, *Foreign Direct Investment in Canada* (1972), p. 339.
176. K. Stegemann, *Canadian Non-Tariff Barriers to Trade* (1973), p. 39.
177. The figure is supplied by A.L.C. de Mestral, "The Impact of the GATT Agreement on Government Procurement in Canada," in *Non-Tariff Barriers After the Tokyo Round* (J. Quinn and P. Slayton, eds.) (1982), p. 171.
178. Signature authorized by Order in Council P.C. 1979-3298, December 6, 1979. GATT Doc. MTN/NTM/W/211/Rev. 2; 18 *Int'l Leg. Mat.* 1052 (1979); for consolidation see GATT, *Agreement on Government Procurement* (Geneva, 1979), hereinafter cited as the Agreement on Government Procurement.
179. Article II of the Agreement on Government Procurement provides *inter alia*:
 1. With respect to all laws, regulations, procedures and practices regarding government procurement covered by this Agreement, the Parties shall provide immediately and unconditionally to the products and suppliers of other Parties offering products originating within the customs territories (including free zones) of the Parties, treatment no less favourable than:
 - (a) that accorded to domestic products and suppliers; and
 - (b) that accorded to products and suppliers of any other Party.
180. de Mestral, *supra*, note 177, p. 172.
181. The specific "entities" within the government of each party are set out in Annex I of the Agreement on Government Procurement. For discussion, see de Mestral, *supra*, note 177, pp. 178-80.
182. *Ibid.*, p. 179.
183. *Ibid.*, p. 171; de Mestral relies on federal Department of Supply and Services figures

for 1978–79 indicating federal expenditures of \$9 million out of the \$30 billion total. See note 177, *supra*, and accompanying text.

184. It is perhaps passing strange that no challenge has been forthcoming given the notoriety of the device. For discussion of the coercive use of conditional grants by federal authorities, see P. Lewis, "The Tangled Tale of Taxes and Transfers," in *Canadian Confederation at the Crossroads* (1978), p. 30; D.V. Smiley, *Canada in Question: Federalism in the Seventies* (2d. ed.) (1976), pp. 114–58. There is ample judicial authority for the proposition that a legislature cannot accomplish by indirect statutory language what is beyond its power to do directly. Such legislative techniques are deemed a "colourable" use of legislative power and therefore unconstitutional: e.g., *A.-G. Alta. v. A.-G. Can.* (Taxation), *supra*, note 158; *A.-G. Sask. v. A.-G. Can.* (Sask. Farm Security), [1949] A.C. 110.

To date, however, the same kind of judicial critique has not extended to the use of various non-legislative means employed by government to secure policy objectives beyond their legislative competence. Rather, and perhaps surprisingly, the use of spending powers by the federal executive to dictate policy outcomes in the provincial legislative sphere tend to be viewed as constitutionally unobjectionable. See P. Hogg, *Constitutional Law of Canada* (1977), pp. 68–72. In the event the issue is ever tested, it remains to be seen whether the same deference will extend to provincial spending policies.

Ironically, provincial interference with external trade in alcoholic beverages has been assisted by federal withdrawal from a constitutionally overlapping field. See, *infra*, notes 186, 190 and accompanying text.

185. See Stegemann, *supra*, note 176, pp. 39–40.
186. *Cf. Russel v. The Queen*, *supra*, note 168, and the *Local Prohibition and Canada Temperance* cases, *supra*, note 170 and accompanying text:

The result of these cases was that neither level of government could oust the other. As the evil of intemperance came to be viewed as a tolerable vice no less deserving of close regulation, Parliament elected to give the task over to the provinces who were empowered to regulate the local trade in liquor in any event.

Thus s. 3 of the *Importation of Intoxicating Liquors Act*, R.S.C. 1970, c. 1-4, confers an effective market monopoly on each province as follows:

- 3(1) Notwithstanding any other Act or Law, no person shall import, send, take or transport, or cause to be imported, sent, taken or transported into any province from or out of any place within or outside Canada, any intoxicating liquor except such as has been purchased by or on behalf of, and that is consigned to Her Majesty or the executive government of the province into which it is being imported, sent, taken or transported or any board, commission, officer or other governmental agency that, by the law of the province, is vested with the right of selling intoxicating liquor.

The terms of Parliament's conferral of a monopoly are unchanged from the form originally enacted in 1928. See *ibid.*, 18-19 Geo. V, c. 31 (Can.), s. 3(1).

In contrast to the foregoing, the last vestiges of federal "temperance" legislation were repealed in 1984 (See *Canada Temperance Act*, R.S.C. 1970, c. T-5 (as amended); repealed by S.C. 1983–84, c. 40, s. 69; in force June 29, 1984) suggesting further federal withdrawal from the field.

187. See, e.g., *Liquor Control Act*, R.S.O. 1980, c. 243, s. 3 (outlining the purposes and powers of the Liquor Control Board). See also *Liquor Control and Licensing Act*, R.S.B.C. 1979, c. 237; *An Act Respecting the Commission de contrôle des permis d'alcool* R.S.Q. 1977, c. C-33.
188. For the fiscal year 1982–83 the LCBO had sales of \$1,467,296,000 as against operating expenses of \$204,142,000; expenses constituted 13.9 percent of total sales and net income was \$523,228,000. See Liquor Control Board of Ontario, *57th Report* (1983).
189. For a comprehensive discussion of the problem, see I. Bernier, "Le GATT et le problème du commerce d'Etat dans les pays à économie de marché: Le cas des monopoles provinciaux des alcools au Canada" (1975), 13 *Can. Yrbk. Int'l L.* 98. The United States was an early complainant in this area. See U.S. Tariff Commission,

- Trade Barriers*, Report to the Committee on Finance of the United States Senate and the Senate Subcommittee on International Trade, Part II, Ch. IX (1974), p. 59. See also Stegemann, *supra*, note 176, pp. 65–75.
190. See the *Importation of Intoxicating Liquors Act*, *supra*, note 186.
 191. Stegemann, *supra*, note 176, p. 66.
 192. Cf. La Forest, *supra*, note 34.
 193. See, e.g., R.R.O. 1980, Reg. 580, ss. 1–3 (government stores); s. 4 (product standards for Ontario wine); s. 17 (reporting requirements for Ontario wine manufacturers); ss. 18 and 19 (purchase permits). See also the *Wine Content Act*, R.S.O. 1980, c. 534 and pursuant thereto, R.R.O. 1980, Reg. 947.
 194. E.g., Honourable Frank S. Miller, former Treasurer of Ontario, *Ontario Budget 1980* (1980), p. 31 (Discount on Licensees' Purchases of Spirits, Wines and Imported Beer); *Ontario Budget 1981* (1981), p. 32 (Revenue changes for Beverage Alcohol); *Ontario Budget 1982* (1982), p. 27 (Revenue from Beverage Alcohol).
 195. Source: personal interview with Ontario government officials, Ministry of Industry and Trade, Toronto, January 13, 1984.
 196. See, e.g., Liquor Control Board of Ontario, *Listing and Product Policy* (effective April 1, 1982).
 197. *Ibid.*, s. 4(e) which outlines the criteria employed by the LCBO for treating requests of suppliers or agents to have their products listed in Ontario as follows:
 - (e) The request will be considered on the merits of the product by the following criteria:
 - (i) quality,
 - (ii) price,
 - (iii) public demand,
 - (iv) marketability,
 - (v) relationship to other products of the same type already listed by the Board,
 - (vi) performance in other markets.
 198. Cf. s. 5(a), which states: "(a) Every product listed by the Board will be listed in every all-brand store."
 199. Cf. s. 7(6), which states: "6. Certain brands may be considered by the Board to be 'Required Listings' and will be tendered from time to time."
 200. By the *Liquor Control Act*, R.S.O. 1980, c. 243, s. 3(e), the LCBO authorizes Ontario wineries to operate Winery Retail Stores and the marketing of beer through Brewers' Retail Stores operated by the Brewers' Warehousing Company Limited. As of March 31, 1983, Ontario wineries had 154 wine stores in the province, an increase of 34 outlets over the previous year. Liquor Control Board, *57th Annual Report* (1983), p. 16.
 201. For analysis, see G.R. Winham, "Bureaucratic Politics and Canadian Trade Negotiations" (1978–79), 34 *Int'l. J.* 64, pp. 79–83.
 202. M. Tucker, *Canadian Foreign Policy: Contemporary Issues and Themes* (1980), pp. 59–60.
 203. See Canada, Department of Industry, Trade and Commerce, *Multilateral Trade Negotiations 1973–1979* (undated), pp. 98–99 (hereinafter cited as the MTN).
 204. Sources at the Department of External Affairs (telephone communication, November 24, 1983) and provincial officials, *supra*, note 195, confirm a mutual understanding of the statement of intent as only a best efforts undertaking and not a legally binding commitment.
 205. See the GATT, *supra*, note 13, Art. 24, para. 12: "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."
 206. Source: undated memorandum forwarded to the author from the Communications division of the Liquor Control Board of Ontario, Toronto (1984).

207. Since this article was written, the European Economic Community (EEC), in the spring of 1985, filed a new comprehensive complaint against the government of Canada with the GATT Secretariat in Geneva. The complaint alleges direct violation of the GATT and nullification and impairment of privileges accorded thereunder by Canada to EEC Contracting Parties, as a result of the general "practices" of provincial liquor marketing boards.

The "liquor marketing" case will be a precedent under the GATT with respect to the obligations of federal state signatories for the actions of subnational government authorities. See the GATT treaty, *supra*, note 13, Art. 24, para. 12.

208. See *King c.o.b. Winchester's Dining Lounge and Tavern v. Liquor Control Board of Ontario* (1981), 21 C.P.C. 194 (Ont. H.C., *per* Linden J.) (defendant's motion to strike and alternatively for a preliminary trial of the constitutional issue presented by the plaintiff dismissed). The plaintiff is no longer within the jurisdiction to continue the action. Source: Office of R.J. Rolls, Q.C. (Toronto), counsel to the plaintiff King (telephone communication by this writer, March 22, 1984).

209. See "EEC Protesting Alcohol Prices," *The Globe and Mail*, June 9, 1984, p. B-2, col. 8.

210. MTN, *supra*, note 203, p. 98.

211. *Supra*, note 195.

212. Canada, Department of External Affairs, *Canadian Trade Policy for the 1980's* (1983), p. 51.

213. R. Simeon, "The Federal-Provincial Decision Making Process," in Ontario Economic Council, *Intergovernmental Relations* (1977), 25, p. 25.

214. See Smiley, *supra*, note 6, pp. 91-119.

215. See R. Simeon, *Federal-Provincial Diplomacy[:]* *The Making of Recent Policy in Canada* (paper ed., 1973).

216. See *P.E.I. Potato Marketing Board v. Willis*, [1952] 2 S.C.R. 392; [1952] 4 D.L.R. 146 (administrative interdelegation); *A.-G. Ont. v. Scott*, *supra*, note 143 (incorporation by reference); *Coughlin v. Ontario Highway Transport Board*, [1968] S.C.R. 569; 68 D.L.R. (2d) 384; and *R. v. Smith*, [1972] S.C.R. 359, 21 D.L.R. (3d) 222 (anticipatory incorporation by reference).

217. *A.-G. N.S. v. A.-G. Can. (Nova Scotia Interdelegation Case)*, [1951] S.C.R. 31; [1950] 4 D.L.R. 369.

218. See, e.g., documents from the Federal-Provincial Conference of First Ministers on the Constitution (September 1980); and from the Continuing Committee of Ministers on the Constitution (J. Chrétien and R. Romanow, Joint Chairmen) (1980-81).

219. The federal-provincial negotiations on constitutional reform, *supra*, note 218, remained deadlocked until a compromise was induced by the ruling of the Supreme Court of Canada on the unilateral patriation of the Constitution incorporating a Charter of Rights: *Reference re Amendment of the Constitution of Canada* (Nos. 1, 2 and 3), *supra*, note 7. See generally R. Sheppard and M. Valpy, *The National Deal[:]* *The Fight for a Canadian Constitution* (1982).

220. *Viz.* federal-provincial negotiation Richard Simeon, *supra*, note 215, p. 286, observed:

The process has a direct effect on the kinds of conflict in the system, and on ways of resolving it. . . . Because federal-provincial negotiation is so important, major issues tend to become defined as federal-provincial ones. In doing so, the status and prestige concerns of governments, which may be harder to resolve, are superimposed over simple policy differences. . . . Added to this is a great visibility of the process at the political level. A few times each year the premiers and prime ministers come together in what are widely described as "confrontations."

221. Tucker, *supra*, note 202, p. 58.

222. *Ibid.*, p. 59.

223. D.A. Soberman, "Canada's Institutional Deficit" (1983), 8 *Queen's L.J.* 204, p. 205.

224. *Ibid.*, pp. 207-208, footnotes 1 and 3, citing the Task Force on Canadian Unity, A

- Future Together* (1979), pp. 96–97, and Quebec Liberal Party, *A New Canadian Federation* (1980), pp. 51–56 respectively. See generally R.L. Watts, "Second Chambers in Federal Political Systems," in Ontario Advisory Committee on Confederation, *The Confederation Challenge* (1970), vol. 2, p. 318; R.M. Burns, "Second Chambers: German Experience and Canadian Needs" (1975), 18 *Can. Pub. Adm.* 541; P. Weiler, "Confederation Discontents and Constitutional Reform: The Case of the Second Chamber" (1979), 29 *U. Toronto L. J.* 253.
225. Establish pursuant to Art. 4 of the *Treaty Establishing a Single Council and a Single Commission of the European Communities* (Merger Treaty), done at Brussels April 8, 1965, in force July 1, 1967, 13 *Eur. Yrbk.* 461 (1965), replacing Art. 151 of the *Treaty Establishing the European Economic Community* (Rome Treaty), done at Rome March 25, 1957, in force January 1, 1958, 4 *Eur. Yrbk.* 413 (1958).
- Each member state of the EEC maintains a Permanent Mission of 20 to more than 100 officials, drawn mostly from home ministries of foreign affairs but also finance, economic affairs and other departments, each acting in an advisory capacity to their respective governments and as a bureaucratic infrastructure for the EEC Council of Ministers. See generally E. Noël, "The Committee of Permanent Representatives" (1967), 5 *J. Common Market St.* 219; E. Noël and H. Étienne, "The Permanent Representatives Committee and the 'Deepening' of the Communities" (1971), 6 *Gov't and Opposition* 422; E. Stein, *Harmonization of European Company Laws — National Reform and Transnational Coordination* (1971), pp. 227–29.
226. Soberman, *supra*, note 223, p. 208.
227. See *supra*, notes 120 to 140 and accompanying text.
228. See *Canada and the New Constitution[:] The Unfinished Agenda* (S.M. Beck and I. Bernier, eds.) (1983), vols. 1 and 2.
229. Cf. Sheppard and Valpy, *supra*, note 219.
230. See, e.g., I. Bernier, "Les affaires extérieures: la perspective juridique," in *Canada and the New Constitution[:] The Unfinished Agenda* (S.M. Beck and I. Bernier, eds.) (1983), vol. 2, p. 187.
231. C. Pestieau, "External Economic Relations and Constitutional Change," in *Canada and the New Constitution[:] The Unfinished Agenda* (S.M. Beck and I. Bernier, eds.) (1983), vol. 2, p. 246.
232. See, e.g., the reform proposals on international matters contained in Canadian Bar Association, Committee on the Constitution, *Towards a New Canada* (1978), pp. 125–28.
233. *Ibid.*, chap. 22, Recommendation 6, p. 126: "6. A Treaty dealing predominantly with a matter falling within provincial legislative competence should constitutionally require ratification by a majority of a reconstituted Upper House representing the provinces." On Senate reform see, e.g., chap. 8, pp. 37–46; *British Columbia's Constitutional Proposals* (1978), Pap. No. 3, pp. 29–44; and sources cited, *supra*, note 224.
234. By the U.S. Constitution, Art. II, s.-s. 2, "[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur."
- In the United States it is also possible for the President to enter into international obligations through executive agreements not subject to Senate ratification. While important international undertakings usually take the form of a treaty, it has been argued that from an external point of view there is little to distinguish the two. See M.S. McDougal and A. Lans, "Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy" (1945), 54 *Yale L.J.* 181, 534 (Parts I and II); E. Borchard, "Treaties and Executive Agreements — A Reply," p. 616. See generally L. Henkin, *Foreign Affairs and the Constitution* (1972), pp. 129–88.
235. Bernier, *supra*, note 230, p. 215.
236. Here I follow the suggestion of Donald S. Macdonald, Chairman of the Royal Commission on the Economic Union and Development Prospects for Canada, made in oral comments following my presentation of an earlier draft of this paper at a

meeting of the Commission's research group on the Canadian Economic Union chaired by Mark Krasnick, held in Ottawa, May 24–25, 1984.

237. See note 203, *supra*, and accompanying text.
238. See note 204, *supra*, and accompanying text.
239. *Reference Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 750; 123 D.L.R. (3d) 554, p. 583.
240. *Cf.* Lord Sankey's regard for the Constitution as a "living tree" in *Edwards, supra*, note 49.
241. E.R. Black and A.C. Cairns, "A Different Perspective on Canadian Federalism" (1966), 9 *Can. Pub. Adm.* 27, p. 27.
242. *Ibid.* Among the four "salient characteristics of the Canadian polity" identified by Professors Black and Cairns the last two appear directly relevant to external trade policy issues:
 3. Economic and social factors respond to political forces just as political forces respond to them.
 4. The survival of a federal system depends upon the flexibility of its constitutional process in accommodating demands unforeseen at its birth.*Cf.* Livingston, *supra*, note 3, *passim*.
243. See R. Simeon, "Regionalism and Canadian Political Institutions," in *Canadian Federalism: Myth or Reality?* (J.P. Meekison, ed.) (3d ed., 1977) 292, pp. 294, 297. *Cf.* A.C. Cairns, "The Governments and Societies of Canadian Federalism" (1977), 10 *Can. J. Pol. Sc.* 695, p. 699. For a discussion of these and other sources in support of an institutional perspective see D. Smiley, *Canada in Question*, pp. 5–8.



Energy and Natural Resources

The Canadian Constitutional Framework

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Introduction

With the exception of patriation of the Constitution, the leading Canadian constitutional law issues of the 1970s and early 1980s centred on the respective powers of the federal and provincial governments in relation to resources. In March 1981, the Government of Saskatchewan released a position paper in which the Supreme Court of Canada was accused of threatening provincial control of resources. In late 1980, the premier of Alberta bought air time on television to announce cutbacks of provincial oil production, in response to the federal government's National Energy Program. Several landmark decisions were handed down by the Supreme Court of Canada analyzing the extent of the powers of each level of government in relation to resources. Confusion over offshore jurisdiction resulted in a number of near-crises for the oil industry. And last, but far from least, the patriation process led to inclusion of s. 92A, the resources amendment, which explicitly expanded the parameters of provincial legislative authority.

This turbulent decade has, to some degree, helped to clarify the limits of federal and provincial legislative authority over resources. On the other hand, some critical legal issues remain unresolved, in part because governments have elected to settle their differences by agreements. Moreover, it will be some time before the impact of s. 92A will be fully understood.

The first part of this paper is devoted to a review of constitutional law with respect to natural resources, but with emphasis on the developments of the past ten years. We will trace both the locus of these developments and suggest the nature of the constitutional consensus

that seems to have evolved in certain areas. We will also identify those areas where such a consensus is lacking and suggest some possibilities for the evolution of law on those issues.

In charting the development of constitutional law with respect to natural resources in the first section, we will necessarily stress its evolution in the context of judicial decisions. However, it is trite to point out that much at the heart of federal-provincial constitutional wrangling — and even more so, of federal-provincial cooperation — will not be analyzed in courtrooms. Yet here is the lifeblood of federal states, the means by which the skeletons of constitutions are given flesh.

The second part of this paper therefore discusses some of the techniques that have been used by governments to buffer the sometimes-perceived rigidities of the Canadian Constitution in the field of natural resources. They represent the adaptations to changing circumstances that any workable constitution must in some way accommodate. Some of these techniques are highly sophisticated, others at times appear insubstantial. Some have been used cooperatively as a means of giving effect to a mutually-agreed upon solution to a particular problem; others have been employed unilaterally when efforts to achieve a consensus have failed. But what should be stressed is that our choice of techniques is highly selective. Our purpose is not to catalogue the minutiae of federal-provincial exchange; it is, rather, to suggest the wide range of available means by which the Canadian Constitution can be made to accommodate even the very rapid change which has characterized the natural resources sector over the past decade.

Finally, in the last section of this paper we offer some brief conclusions.

Division of Powers

Introduction

This portion of the paper discusses in some detail the “formal” constitutional law with respect to natural resources in Canada. The sections that follow are organized in a functional fashion, examining, in turn, ownership of resources and the implications of such ownership under doctrines of Canadian constitutional law; exploration, development, and production of resources; marketing and transportation; and fiscal controls. Because these sections draw heavily upon judicial decisions of the past decade and a half, much of the analysis pertains to energy issues.

Important issues of constitutional law also arise in relation to the environment in general, and management of water resources in particular. The functional approach outlined above does not adapt itself readily to an examination of such issues, because environmental

resources are “common” in nature and give rise to constitutional problems rather different from those relating to in situ resources. Therefore, a special section is devoted to an examination of issues raised by what we might call environmental resources.

The substantive sections that follow focus upon the current law in relation to the powers of each level of government. Emphasis is placed upon those areas, however, where constitutional ambiguity persists, and upon the potential outer limits of each government’s authority — regardless of the likelihood of such authority actually being exercised.

THE FEDERAL POWERS

Before engaging in this analysis, it may be helpful to set out briefly the legal tools available to each government under the *Constitution Acts, 1867 to 1982* and under the doctrines developed by the courts. The authority of the federal government arises from the following specific heads:

- s. 91(2): The Regulation of Trade and Commerce;
- s. 91(3): The Raising of Money by any Mode or System of Taxation;
- s. 91(29): Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces;
- s. 92(10)(a): Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
- s. 92(10)(c): Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

In addition, the federal government may rely upon its residual power contained in the opening of s. 91 and relating to “the Peace, Order, and good Government of Canada” (POGG). It also has the power to disallow provincial legislation, as well as the power to expropriate provincial property for federal purposes. The latter four powers (s. 92(10)(c) — the declaratory power, POGG, disallowance, and expropriation) require a brief examination before turning to the sources of provincial powers.

The declaratory power under s. 92(10)(c) has been employed some 470 times, and has been aptly described as “the stuff provincial nightmares are made of.”¹ In the past it has been relied upon to place such diverse matters as prairie grain elevators and atomic energy under federal control, although its primary use has been in relation to local undertakings such as railways. During the energy wars of the 1970s, it was frequently cited as a mechanism available to the federal government to bring the energy-producing provinces to heel. Notably, its use is not subject to judicial scrutiny; the only legal issue that could ever arise is whether,

from a technical point of view, the Parliamentary "declaration" has been properly conducted. The courts have no role to play in second-guessing Parliament's decision to declare a particular work for the general advantage of the country. Because of the enormity and unrestrained nature of this declaratory power, the provinces promoted its abolition or restraint during the early debates on patriation.² This provincial desire did not succeed in the end. It should be noted that the declaratory power was last exercised in 1961,³ and the political ramifications of employing it in so sensitive an area as resources would be wide indeed.

The federal government's general power to legislate for the "Peace, Order, and good Government of Canada" has undergone some judicial alteration in the past decade, most notably in the *Anti-Inflation Reference*.⁴ In the early years, courts treated the POGG power as applying where uniform legislation was required in relation to a matter affecting several provinces. Later, it was held to come into play when a subject did not come within any of the specific enumerations in ss. 91 and 92, or in an emergency situation.

In the *Anti-Inflation* case, the Supreme Court of Canada was called upon to determine the validity of sweeping financial measures imposed by the federal government that established wage, profit, and price controls. Laskin C.J.C., on behalf of himself and three other members of the Court, held that "the mere desire for uniformity cannot be a support of an exercise of the federal general power" (D.L.R. at 477). However, upon reviewing the circumstances that led to the passage of this legislation, he was unable to conclude that Parliament did not have a rational basis for regarding the legislation "as a measure which, in its judgment, was temporarily necessary to meet a situation of economic crisis imperilling the well-being of the people of Canada as a whole" (D.L.R. at 498). Thus, he upheld the legislation as a valid exercise of the POGG power.

Similarly, three other judges held that the POGG power could be exercised where there is "an urgent and critical situation adversely affecting all Canadians and being of such proportions as to transcend the authority vested in the Legislatures of the Provinces and thus presenting an emergency which can only be effectively dealt with by Parliament ..." (D.L.R. at 507).

The POGG power has also received judicial consideration recently in the context of major resources conflicts. In *Reference Re Proposed Federal Tax on Exported Natural Gas*⁵ the dissenting judges (Laskin C.J.C., McIntyre and Lamer JJ.) pointed out that although the National Energy Program could be supported on the basis of the federal trade and commerce power, the POGG power is "a more apt repository of authority"⁶ where a legislative program relates to social and economic conditions throughout Canada. Moreover, "the power to legislate for the peace, order and good government of Canada must be given no less a contemporary exposition than any other powers delineated in ss. 91

and 92 of the *British North America Act, 1867*. Sterilizing grants of the constitutional power does a disservice to a living constitution.” These judges viewed the *Anti-Inflation* case as having “laid to rest once and for all the idea that the general power could be invoked (apart from its purely residual scope) only in time of a war emergency” (W.W.R. at 417).

More recently, the Supreme Court, in a unanimous judgment, held that legislative jurisdiction over the exploration and exploitation of the continental shelf falls to Canada in its residual capacity under POGG.⁷ Thus, it may be asserted that the courts have shown considerable willingness in recent years to uphold federal action on the basis of the POGG power.

The federal power to disallow provincial statutes arises from s. 90 of the *Constitution Act, 1867*. Some commentators have argued that this power could still be used, especially to protect civil liberties. However, the prevailing view appears to be that it is now obsolete (by convention), or, alternatively, ought not to be exercised in view of “the modern development of ideas of judicial review and democratic responsibility.”⁸ In any event, the power has not been exercised since 1943.

Finally, the federal panoply of powers may include the right to expropriate provincial property for a federal purpose. For example, in *A.-G. Quebec v. Nipissing Central Railways Co. and A.-G. Canada*,⁹ the power of a federal railway to expropriate lands was held to extend to provincial Crown lands. The scope of this power is somewhat uncertain, however, and may have relatively limited application to in situ resources, as the following observation of the Supreme Court of Canada indicates:¹⁰

But although the Dominion may, by legislation enacted in exercise of its exclusive powers relating to railways and canals, authorize the construction through the property of a province of a railway or canal, to which its jurisdiction extends, this does not involve the right to appropriate the whole beneficial interest of the site of the work (including the minerals, for example), for the purpose of making it available as an asset or source of revenue for the benefit of the Dominion or of the Dominion’s grantees, where that site is vested in His Majesty and is, by the B.N.A. Act, subject to the administration and control of the Provincial legislature.

THE PROVINCIAL POWERS

On the provincial side, the following specific heads of s. 92 are especially important:

- s. 92(2): Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes;
- s. 92(5): The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon;

- s. 92(13): Property and Civil Rights in the Province;
- s. 92(16): Generally all Matters of a merely local or private Nature in the Province.

A few other sections of the *Constitution Act, 1867* are also relevant. These include s. 109 (confirming that “All Lands, Mines, Minerals, and Royalties” belonging to and situated in the founding provinces would continue to fall under provincial ownership); s. 121 (“All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall ... be admitted free into each of the other Provinces”); and s. 125 (“No Lands or Property belonging to Canada or any Province shall be liable to Taxation”).

The inclusion of s. 92A (the resources amendment) in the *Constitution Act* followed from lengthy negotiations between Ottawa and the provinces during the patriation process. It is set out in full as Appendix A. Briefly, however, it grants to the provinces the power to levy taxes in any manner or mode on resources (thus expanding upon their original power to levy only “indirect” taxes). This does not, however, derogate from the federal government’s powers in relation to taxation. The amendment does grant the provinces certain exclusive legislative powers in relation to the exploration, development, and production of resources within their boundaries, but many of these powers had been identified by previous court decisions. Finally, the provinces have been granted certain new rights in relation to the export of resources to other provinces, but these are subject to the retention by the federal government of its powers in this regard. The ramifications of the resources amendment for provincial legislative power will be explored in greater detail in the following sections.

Ownership of Resources

THE OFFSHORE

The legal conflicts that can arise in relation to offshore resource rights in a federal state may be characterized at three different levels. The first pertains to the limits of a coastal state’s rights vis-à-vis adjacent coastal states and other users of the sea. These conflicts are governed by international law and, generally, are beyond the scope of this paper. The second relates to the allocation of rights between the federal government and a coastal province. Thirdly, conflicts may arise between two or more coastal provinces.

The latter two issues are primarily matters of domestic law, although their resolution can be very much affected by the existence of international principles. For example, even the term “ownership” is somewhat inaccurate in relation to offshore resources, as a coastal state’s powers in this respect are limited by the rules of international law. Such principles

dictate that a coastal state has the sovereign right to explore and exploit the resources of its continental shelf. The coastal state's rights in relation to the (now 12-mile) territorial sea are greater, but are nevertheless subject to the right of innocent passage. The method of measuring these areas from a coastal state in different geographical and historical circumstances is also drawn from international law. Moreover, courts may resort to principles of international law to resolve conflicts within a federal state, by analogy to disputes between sovereign states.

Conflicts over offshore resource rights in Canada have existed for over two decades. The various coastal provinces have put forward different arguments in support of their particular positions, based upon unique historical and geographical factors. A trilogy of Supreme Court decisions between 1967 and 1984 has begun to clarify the offshore picture in relation to federal-provincial disputes, although a number of important legal questions remain unanswered.

The 1967 *Reference Re Ownership of Offshore Mineral Rights*¹¹ addressed the respective rights of British Columbia and Canada in relation to the continental shelf and the territorial sea. It was held that Canada had property in, the right to explore and exploit, and legislative jurisdiction in relation to the lands (including the mineral and other natural resources) "of the seabed and subsoil seaward from the ordinary low-water mark on the coast of the mainland and the several islands of British Columbia, outside the harbours, bays, estuaries and other similar inland waters, to the outer limits of the territorial sea of Canada" (S.C.R. at 796). In relation to the continental shelf, the Court also held that Canada, not British Columbia, had the right to explore and exploit the minerals and other natural resources, as well as legislative jurisdiction over them. The Court's reasoning is difficult to follow, and has been widely criticized as confusing common law principles with those of international law.¹²

The implications of the 1967 *Offshore Reference* for the offshore generally were unclear, as was demonstrated some ten years later when the British Columbia Court of Appeal decided the *Georgia Strait Reference*.¹³ Here the issue posed was whether lands underlying the Strait of Juan de Fuca, the Strait of Georgia, Johnstone Strait, and Queen Charlotte Strait (the area generally between the mainland and Vancouver Island) were the property of British Columbia. The answer, by a majority of three to two, was in the affirmative. The majority relied upon the view that this question had not been dealt with by the Supreme Court of Canada in the 1967 *Offshore Reference*, and that the boundaries of British Columbia end at the Pacific Ocean. Thus, it was held that the areas at issue in the *Reference* belonged to the province.

In May 1984 this decision was affirmed by the Supreme Court of Canada, by a majority of four to two.¹⁴ The Supreme Court's opinion in the *Georgia Strait Reference* may turn out to be among the most impor-

tant of the decade, given its implications for other similar geographical areas, most notably the area north of Vancouver Island and the area lying between mainland British Columbia and the Queen Charlotte Islands. It may also have implications for areas on the east coast.

Dickson J. (as he then was), delivering the majority opinion, was careful to point out that the *Georgia Strait Reference* concerned proprietorship alone, and did not impinge upon matters of legislative jurisdiction. He first determined that the straits in question had not been included in the court's opinion in the *1967 Offshore Reference*. In his view, the *1967 Offshore Reference* clearly related only to the territorial sea as then defined by international law, that is, "the waters and submerged lands to a width of three miles seaward of the coast of the mainland but where the mainland coast is deeply indented or has a fringe of islands in its immediate vicinity, seaward from baseline enclosing these features" (at pp. 299–300). Given the location of these straits, they obviously did not fall within territorial sea as so defined.

The Attorney-General of Canada asserted that the straits had been included in the *1967 Offshore Reference*, on the grounds that they were not part of the "harbours, bays, estuaries and other similar inland waters" (emphasis added) specifically excluded from the 1967 case. Canada's reasoning was that "inland waters" is a common law term denoting waters inter fauces terrae (within the jaws of the land), which are considered to be within the body of a "country." Canada argued that the straits did not fit the common law definition of waters inter fauces terrae, and thus were not "inland" waters. In Canada's view, "internal waters" is an international law term referring to waters on the landward side of baselines delimiting the territorial sea. Without citing authority, Dickson J. opined that "by the mid-twentieth century the term inland waters could accurately be applied to either the common law or the international law concept" (at p. 297). Thus, in his view, a determination that the waters were not inter fauces terrae would not necessarily be dispositive of whether the straits were "inland" waters.

Madam Justice Wilson's dissenting opinion reviews in some detail the common law concept inter fauces terrae. Although finding a great deal of confusion in the law on the subject, she concludes that these straits cannot be so considered because they are bounded by "jaws" (or headlands) in different countries — Canada to the north, and the United States to the south (at p. 359).

The court's deliberations on these points leave us in considerable doubt as to the characterization of waters inter fauces terrae, and also leave for future resolution the precise meaning of the terms "inland" and "internal" waters. The balance of the majority decision turns upon the construction of certain documents in the history of Vancouver Island and British Columbia, which in the view of Dickson J. led to the conclusion that the straits had been part of British Columbia at the time it

entered Confederation in 1871. This part of the decision is perhaps of less general interest, as the position of other provinces would depend upon their own particular histories.

The question of resource rights offshore Newfoundland has had a long and acrimonious past, and certain aspects remain to be determined. Following years of negotiations, each level of government framed its own reference to the courts, the federal one pertaining to the Hibernia oilfield (thus raising only issues about the continental shelf), and the Newfoundland one raising broader questions, including rights in relation to the territorial sea.

The *Newfoundland Reference* will be discussed first as it was relied upon, in part, by the Supreme Court of Canada in its decision on the *Federal Offshore Reference*. The provincial government posed this general question:

Do the lands, mines, minerals, royalties or other rights, including the right to explore and exploit and the right to legislate, with respect to the mineral and other natural resources of the seabed and subsoil from the ordinary low-water mark of the Province of Newfoundland to the seaward limit of the continental shelf or any part thereof belong or otherwise appertain to the Province of Newfoundland?¹⁵

In responding to this question, the Newfoundland Court of Appeal classified the seabed and subsoil into three distinct areas:

- that underlying Newfoundland's inland waters (i.e., its harbours, bays, estuaries, and other bodies of water that are inter fauces terrae);
- that of the territorial sea, which extends from the low-water mark or, where appropriate, from the proper baselines of inland waters seaward from a set distance (in this case, the three marine miles of the territorial sea claimed by Newfoundland prior to joining Confederation in 1949);
- that of the continental shelf, extending from the seaward boundary of the territorial sea to the seaward limit of the continental shelf.

The Court did not deal with the question of how to delimit inland waters, territorial sea, or the continental shelf. Rather, it focussed on the matter of Newfoundland's rights to the territorial sea and the continental shelf.

In the *1967 Offshore Reference* it had been held that the territorial sea did not belong to British Columbia because at the time of its union with Canada (1871), the territorial sea was not part of British Columbia's territory. The Newfoundland Court of Appeal came to a different conclusion in the case of Newfoundland. It held that at the time the doctrine of the territorial sea was emerging in international law, Newfoundland had the constitutional status to acquire new areas of territory and new jurisdictional rights. Moreover, it had exercised such rights in a number of statutes (at p. 28 et seq.). The court held that this position was not

diminished by the establishment of the British Commission government in the 1930s (at p. 31 et seq.). Finally, upon reviewing in detail the terms upon which Newfoundland entered Confederation in 1949, the court concluded that Newfoundland's sovereign rights in relation to the territorial sea remained vested in the province (at p. 34 et seq.).

With respect to the continental shelf, Newfoundland did not fare as well. The court accepted the fact that by the time of the Geneva Convention in 1958, coastal states had sovereign rights to explore and exploit the resources of the continental shelf. However, because the historical record of Newfoundland prior to 1949 revealed no act by which rights to the continental shelf had been acquired, the shelf was beyond the boundaries of the province and not within its legislative jurisdiction.

Thus, in relation to the continental shelf, the Newfoundland Court answered the provincial claim in the negative. In relation to a three-mile territorial sea, the answer was positive, subject to any interference with these rights that might arise from any valid legislation of the Parliament of Canada in respect of the territorial sea and inland waters.

The argument before the Supreme Court of Canada on the *Federal Offshore Reference* was heard a few days after the Newfoundland Court of Appeal's decision (in February 1983), although the Supreme Court's judgment was not handed down until nearly a year later (March 8, 1984). As indicated above, the *Federal Offshore Reference* related only to the Hibernia oil field, an area clearly beyond the territorial sea. In relation to this area, the Court was asked whether Canada or Newfoundland had:

- the right to explore and exploit the said mineral and other natural resources, and
- legislative jurisdiction to make laws in relation to the exploration and exploitation of the said mineral and other natural resources.

The Court pointed out that the issue before it was one of extra-territorial rights, and whether the rights accorded a coastal state by international law, in relation to the continental shelf off Newfoundland, fell to Canada or the province (*Federal Offshore Reference*, at p. 396). To find in favour of Newfoundland, the Court recognized that it would be necessary to distinguish the 1967 *Offshore Reference*.

For purposes of argument, the Court assumed that, in 1949, international law recognized that continental shelf rights of coastal states arose by operation of law (at p. 397). Even so, it concluded that, under colonial law, colonies lack both extra-territorial legislative and executive competence, as well as any extra-territorial sovereign rights conferred by international law (for example, rights in relation to the continental shelf). "It is only when a former colony, as a matter of constitutional law, acquires external sovereignty that it can also acquire continental shelf rights. Until such time it is the British Crown that is the beneficiary of the extra-territorial rights over the continental shelf accorded by interna-

tional law" (at p. 400). Having reasoned that the nine other provinces never acquired external sovereignty, and thus are incapable of acquiring continental shelf rights, the Court considered whether, for any reason, Newfoundland's position might be different.

The Court observed that prior to 1934 Newfoundland did acquire external sovereignty, in view of the fact that, under the Balfour Declaration, Newfoundland and other Dominions were equated with Britain (at p. 401). However, this right was lost in the period 1934-49, when Newfoundland voluntarily submitted to a non-democratic commission of government. Any continental shelf rights available at international law during this period would accrue to the Crown in right of the United Kingdom (p. 403 et seq.).

Nor was this situation altered in any way by the Terms of Union under which Newfoundland joined Confederation in 1949 (p. 410). The Court was unable to construe any of these terms so as to grant continental shelf rights to the new province.

Even assuming that it was wrong as to Newfoundland's position under Canadian law, the Court was unable to find that in 1949, international law permitted continental shelf rights to arise by operation of law (p. 418). It felt that state practice as of 1949 was "neither sufficiently widespread to constitute a general practice nor sufficiently consistent to constitute settled law" (at p. 416). Nor could the internationally recognized rights be available retroactively to help Newfoundland's position (p. 418).

Thus, as the continental shelf was not territory within the province, the province could not have any legislative jurisdiction over the area. Rather, it falls to the federal government under its peace, order and good government authority (p. 419).

This combination of British Columbia and Newfoundland cases has answered definitively the matter of federal versus provincial rights in relation to the continental shelf. Offshore British Columbia, the territorial sea is within federal control, while, according to the Newfoundland Court of Appeal, Newfoundland retains rights in relation to a three-mile territorial sea. The straits between Vancouver Island and the mainland belong to British Columbia.

A number of complex constitutional issues remain unresolved. Do the historical circumstances of other east-coast provinces permit them to claim portions of the territorial sea? Following the *Georgia Strait Reference*, are there other bodies of coastal waters that may fall under provincial ownership and/or control? In either case, conflicts between federal and provincial legislative jurisdiction over such areas seem almost inevitable.

The above issues pertain to the second of the three matters outlined at the beginning of this section, federal-provincial disputes. If coastal provinces (other than British Columbia) successfully assert rights over even limited offshore areas, boundary delineations will have to be made

as between the provinces, giving rise to the third-level issue outlined above.¹⁶ In 1964, the governments of Nova Scotia, Newfoundland, Prince Edward Island, New Brunswick, and Quebec reached agreement over boundaries in the Bay of Fundy, the Gulf of St. Lawrence, and their adjacent waters. These so-called 1964 Interprovincial Lines of Demarcation were incorporated into the ill-fated 1977 Federal-Provincial Memorandum of Understanding between Canada, Nova Scotia, Prince Edward Island, and New Brunswick.¹⁷ However, their legal effect now is at best questionable. The 1982 agreement between Nova Scotia and Canada, discussed in detail in the section concerning federal-provincial agreements, sets offshore boundaries, but these have not been agreed to by any of the other affected provinces.

The scope for endless legal wrangling in relation to this long list of unresolved issues makes it obvious that federal-provincial agreements on offshore management are essential, regardless of the legal rights of particular parties. As is apparent in the case of Newfoundland, a negative court determination does not dissolve the legitimate social and economic concerns of a coastal province. The unsettled nature of the law on many important issues also means that a stable environment for offshore economic development over the short to medium term can only be established if the governments are able to resolve their differences at the negotiating table.

THE ONSHORE

Our Constitution has admitted of relatively little doubt in relation to ownership of resources found on land in the provinces. Nevertheless, other critical legal issues have arisen, the most important one being the limits of provincial authority in relation to the resources it owns.

At the time of Confederation, s. 109 of the *Constitution Act, 1867* confirmed that "All Lands, Mines, Minerals, and Royalties" belonging to and situated in the founding provinces would continue to fall under provincial ownership. British Columbia and Prince Edward Island were placed in the same position upon entry in 1871 and 1873, respectively and, considerably later, so were Alberta, Saskatchewan, and Manitoba.¹⁸ Newfoundland also retained its onshore resources upon joining Confederation in 1949.¹⁹ Resources found in the Northwest and Yukon territories are under federal ownership, subject to the outstanding claims of native groups based upon unextinguished aboriginal title.²⁰ Such claims are beyond the scope of this paper, although their resolution has major ramifications for the future of the North. Also beyond the scope of this discussion, but worthy of passing mention, are the host of constitutional issues that surround resources located upon Indian reserves in southern Canada. Indian reserves and other specific lands (such as national parks) were reserved to the federal government under the terms

of the various resources transfer agreements in Western Canada, and present many difficult legal issues that are relevant to development of resources on such lands.²¹

Even though the provinces have proprietary rights in relation to resources within their boundaries, a major issue has developed around the question whether ownership of the resources gives them any broader sphere of activity than that which would normally devolve upon a province in its legislative capacity under s. 92 of the *Constitution Act, 1867*.

Over the past decade or so, the most extreme (and most often articulated) viewpoint on this subject has been that of the province of Alberta. It was succinctly presented by the Honourable Merv Leitch, later Alberta's Energy Minister, in a 1974 speech to the Canadian Council of Resource and Environment Ministers:²²

I want to stress that there is a very fundamental distinction between legislative control over those natural resources owned by the provinces and those owned privately. . . .

. . . The essence of my point is that a provincial government under the constitution has vastly greater control over the natural resources it owns than it does over natural resources it doesn't own. . . .

So the provinces own their natural resources, the next question is, "What can a province do with them?" The answer certainly is no less and conceivably more than any other owner can do with his property. An owner of property can do anything he likes with it until some government, exercising a legislative capacity given to it by the B.N.A. Act, says there are certain things he can't do.

It appears that the Alberta government took this argument even further, while before the Supreme Court of Canada on the *Reference Re Proposed Federal Tax on Exported Natural Gas*.²³ For present purposes, it is sufficient to mention that the Alberta government argued that it was in a superior position to that enjoyed by the older provinces under the various property provisions of the *Constitution Act, 1867*.²⁴ The province's reasoning was based upon s. 1 of the *Constitution Act, 1930*, the schedules to which transferred resources to the province. This section provides that the schedules have the force of law "notwithstanding anything in the *British North America Act, 1867*. . . ." Such an assertion was dismissed out of hand by the three dissenting judges (Laskin C.J.C., McIntyre and Lamer JJ.): "There is simply no basis upon which Alberta can claim a superior position to that of the 1867 confederating provinces".²⁵ The extension of the Alberta position was that "Alberta in respect of its natural resources is not governed by any limiting terms of the Act of 1867 . . . There is no need to say anything more on what is a far-fetched submission."

The majority opinion refers to the Alberta submission, but responds to it in a more subdued way (at p. 428):

We find no requirement to determine the validity of such submission, because of the disposition which we propose of this appeal. It is sufficient to conclude that whether the Province of Alberta's title to its resources be on the level of s. 109 of the *British North America Act, 1867* or on a higher plane the interests of the province are not subject to federal taxation, implementation under s. 91(3), where no regulatory or other valid federal power is the constitutional basis of the taxation, in question.

In order to understand the parameters of the provinces' authority qua proprietor, brief mention should be made of the relevant case law.

The early authorities consist of a trilogy of cases: *Smylie v. The Queen*,²⁶ *Brooks-Bidlake and Whittall, Limited v. Attorney General for British Columbia*,²⁷ and *Attorney General of British Columbia v. Attorney General of Canada*.²⁸ These are discussed in detail later in this paper. It is enough to say here that it has been suggested that this is the result of the three cases:²⁹

What the Crown could do by contract in *Brooks-Bidlake* it could not do solely by legislation under the same circumstances. Legislation enacted under section 92(5) thus stands in no better position as regards federal legislation and federal legislative authority than does any other provincial legislation enacted under section 92. The Crown-proprietor *can* do more than the Crown-legislator, but must do so by appropriately-framed contractual conditions attached to its disposition of Crown-owned resources.

Relying upon these authorities, provincial governments (and Alberta in particular) have employed the contractual device widely to accomplish their goals in resource management. They have done so through insertion in Crown leases of variable royalty clauses (permitting the Crown to alter the royalty rate legislatively during the term of the lease) and compliance with laws clauses (permitting the province to "add on" conditions during the term of the lease).

These devices have never been challenged in the courts. However, in 1977 the Supreme Court of Canada, in *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan*³⁰ (hereinafter *CIGOL*), struck down a provincial royalty surcharge scheme that was applied to Crown leases, notwithstanding that the Crown leases contained a variable royalty clause similar to that used in Alberta. Moull has suggested that the result of the *CIGOL* case is to cast considerable doubt upon the scope of the provincial proprietary rights theory (Moull, 1983, p. 484):

For the short work that the majority decision in *CIGOL* made of any suggestion that the Saskatchewan "royalty surcharge" was a permissible variation in Crown royalty rates indicates a marked retreat from the theory of provincial proprietary rights under which provinces like Alberta have been operating for many years. If the Supreme Court of Canada is not prepared to abide by a variable royalty clause, which is comparatively explicit and specific in its import, then it is not very likely that a Court would abide by the much

more generally-phrased “compliance with laws” clauses upon which other provincial initiatives have been founded.

From this, Moull concludes that the resources amendment is of great importance to provinces such as Alberta, since he asserts that the tendency of the Supreme Court is to ignore or downplay the provincial proprietary rights theory.

With respect, this seems a misreading of the *CIGOL* case. It is true that the Court was invited to uphold the royalty surcharge on the basis that it was authorized by the variable royalty provisions in the Crown lease. But the Court refused to characterize the surcharge as a true royalty and, it may be suggested, with good reason. Alberta’s earlier exercise of its variable royalty power had been through a standard route, namely, an increase in the percentage of the share of production reserved to the Crown. In the case of Saskatchewan, it was not an increased percentage that was sought, but rather the entire increase resulting from the rapid oil price rise. This distinction was drawn in the majority judgment by Martland J. (*CIGOL*, p. 459) and in Dickson J.’s dissenting judgment (*CIGOL*, p. 483). Moreover, the Court was influenced in characterizing the royalty surcharge as a tax by the fact that the very same scheme applied to those lessees operating formerly under freehold leases (now expropriated) that contained no such variable royalty clause.

These are important distinctions. Thus it is suggested that the theory of provincial proprietary rights is not dead, nor has it been significantly wounded by the *CIGOL* decision. It is true that the theory has taken on less importance as a result of s. 92A, which will permit the provinces to carry on various activities through direct legislative means, without having to rely upon the vagaries of provincial proprietary rights. However, if s. 92A is narrowly interpreted by the courts, it may be important for the provinces to be able to resurrect the proprietary rights theory.

Exploration, Development, and Production of Resources

It has always been assumed that provincial governments have extremely broad legislative powers in relation to the exploration, development, and production of resources within their own boundaries. In the case of Crown resources, this power would flow from s. 92(5), at least until such Crown resources are severed. In addition, and especially in regard to non-Crown resources, authority would arise from ss. 92(13) and (16) (property and civil rights in the province, and matters of a merely local or private nature). Pursuant to these powers, all provinces have passed comprehensive laws relating to the disposition of resource rights, and the exploration, development, and production of resources.

Severe limitations upon the provincial freedom of action were suggested as a result of the Supreme Court of Canada’s decision in *Central*

Canada Potash Co. Limited et al. v. Government of Saskatchewan.³¹ At issue in this case was the validity of a provincial prorationing and price stabilization scheme, a direct response to the worldwide potash surplus and an effort to reduce overproduction in the province, thus protecting the industry. In an earlier decision, *Spooner Oils Limited and Spooner v. Turner Valley Gas Conservation Board and the Attorney-General for Alberta*,³² the Supreme Court of Canada had commented favourably upon constitutionality of legislation designed, in part, to prevent the flaring of gas. Such conservation measures were found not to infringe upon the federal trade and commerce power.

The *Central Canada Potash* case, however, raised much broader issues, since the measures taken there were intended to “conserve” in an economic rather than physical sense. The Court took notice of the fact that most of the potash produced in the province was destined for an external market, and thus out-of-province and offshore sales were the principal objects of the licences and directives. While recognizing that “production controls and conservation measures with respect to natural resources in a province are, ordinarily, matters within provincial legislative authority . . . [t]he situation may be different . . . where a province establishes a marketing scheme with price fixing as its central feature” (p. 427). Relying upon the *CIGOL* case, Laskin C.J.C., concluded that the true nature and character of the potash scheme extended to fixing the price to be charged or received in respect of the sale of goods in the export market. Thus, since it clashed with the federal trade and commerce power, the scheme was ultra vires the province. In the result, the province was effectively prevented from pursuing policies designed to conserve the resource from an economic point of view, at least to the extent that such policies could be characterized as interfering with the federal power under s. 91(2).

The scope of the provincial power has been clarified by s. 92A(1), which grants to the provinces the exclusive right to pass legislation in relation to:

- exploration for non-renewable natural resources;
- development, conservation, and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- development, conservation, and management of sites and facilities in the province for the generation and production of electrical energy.

In relation to the possible interpretation of this section, it should be pointed out that s. 92A(1) gives the provinces exclusive powers to make laws in relation to the enumerated matters. This should be contrasted with s-s. (2) and (3), relating to the export of resources from one province to another. Although s-s. (2) gives the provinces authority to pass these “export” laws, that power is explicitly made subject to overriding federal laws in relation to exports, by virtue of s-s. (3).

The contrasting effect of the three subsections may be described as follows. In relation to exports within Canada, the provinces and Ottawa have concurrent legislative jurisdiction, with federal paramountcy in the event of conflict. In relation to s-s. (1) matters, the provinces have the exclusive legislative authority. However, the grant of exclusive authority does not remove the "characterization" power. Thus, in a contest between s. 92A(1) and, for example, the federal trade and commerce power, the courts will still be called upon to decide whether or not the legislation "in pith and substance" relates to a federal subject or to s. 92A(1). This underlying reality of constitutional jurisprudence must be borne in mind in any discussion of the extent to which s. 92A(1) has "expanded" provincial powers. Given this reservation, what has been added by s. 92A(1) to provincial powers in relation to exploration, development, and production?

The term "exploration" appears now for the first time in the section, but, as Ballem has noted, this does not seem to add anything to the pre-amendment situation.³³ The term "conservation" is also new. However, is that term broad enough to embrace economic as well as physical conservation? As noted earlier, the latter was found to be within the provincial sphere as a result of the *Spooner Oils* case, while in *Central Canada Potash* an attempt at economic conservation was struck down as interfering with the federal trade and commerce power. It would appear that such an argument would still have merit, although it may be asserted that the term "development" in s. 92A(1) could "have the effect of supplementing a province's power in relation to conservation of a non-renewable resource and to justify consideration of economic factors" (Ballem, 1983, p. 550).

One fairly clear expansion of the provincial power under s. 92A(1) is that of setting the rate of primary production of non-renewable resources. This power was exercised by the Lougheed government in November of 1980 when, in response to the National Energy Program, it announced cutbacks of oil production from Crown leases. In doing so, it apparently relied upon its proprietary powers, since the production cutback did not extend to freehold leases. While it may be asserted that the amendment would now permit Alberta to control the rate of production from freehold leases as well, it is worth reiterating that such a legislative move could still be characterized as infringing upon the trade and commerce power.

Marketing and Transportation

Even assuming that s. 92A(1) has the effect of expanding provincial powers at the front end of energy and resource development, what is the relative strength of the two levels of government on the downstream side?

As mentioned in the preceding section, s. 92A(2) gives the provinces

legislative authority in relation to the export of resources within Canada, subject to the federal government's overriding authority. It has been suggested (Moull, 1983, p. 486) that one effect of s-s. (2) is to validate Alberta's petroleum marketing scheme, which, prior to the amendment, might have been unconstitutional had it been extended to non-Crown leases. Moreover (Ballem, 1983, p. 551):

. . . it should put beyond all question the competency of Alberta to enact its Gas Resources Preservation Act . . . [T]he main thrust of . . . [which] is to require a permit before gas can be removed from the province.

While both these observations are true, it must be emphasized that they are so only in relation to interprovincial trade, and not at the international level. Where part of a resource is exported within Canada and part outside the country, questions of degree may arise as to whether in such circumstances provincial export controls are valid. Further issues of interpretation could come to light in situations where a resource is destined primarily for export outside Canada, but is refined or treated at another point within Canada prior to leaving the country.

The provincial freedom to legislate in relation to exports within Canada is also limited by the rider "but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada." As has been noted (Ballem, 1983, p. 551), this non-discrimination requirement suggests that Alberta gas must leave the province at a uniform price, thus limiting Alberta's ability to offer discount prices for the purpose of developing new markets in eastern Quebec or the Atlantic Provinces. In the Alberta-Federal Energy Pricing Agreement of 1981,³⁴ discussed in detail in a later section, this constraint has been side-stepped through the establishment of a market development program funded by Alberta but administered by the federal government. This is an innovative method of by-passing the anti-discrimination rider.

A number of questions relating to interpretation of the non-discrimination provision have been identified.³⁵ These include the following: Can a producing province continue to price resources within the province itself at a lower cost than those that are exported? Can one read a distinction into the provision as between discrimination in "prices" and discrimination in "supplies"? Since s. 92A(2) refers only to the making of laws, are decisions of regulatory tribunals such as the Energy Resources Conservation Board exempt from the anti-discrimination requirement?

Section 92A appears to have had relatively little effect upon the respective powers of the governments on the transportation side. The provincial authority in this regard has traditionally been attributed to such parts of s. 92 as s-s. (13) and s-s. (16). The federal power arises from a combined reading of ss. 92(10)(a) and 91(29). The latter grants Parlia-

ment exclusive legislative authority in relation to those subjects expressly exempted from provincial jurisdiction under s. 92, while the former excludes from provincial authority "Works and Undertakings . . . connecting the Province with any other or others of the Provinces, for extending beyond the Limits of the Province."

Thus, it may be asserted that while a province can regulate transportation modes for energy situated within its boundaries, it cannot do so if the mode becomes extra-provincial, i.e., interprovincial or international. This raises the question of exactly when a work or undertaking connects two provinces, or extends beyond the limits of a province.

While there has been considerable jurisprudence about the nature of "Works" and "Undertakings,"³⁶ the issue of when energy-related gathering and feeder lines form part of an extra-provincial undertaking has not received a definitive judicial review. In the *Luscar Collieries* case,³⁷ the Privy Council found that a branch line feeding into an interprovincial railway fell under s. 92(10)(a). However, the decision is unclear as to whether the physical connection alone or other factors (such as the control of the feeder line or the interconnecting nature of the traffic) were most significant. Similarly, the federal Board of Transport Commissioners has found a gathering pipeline to form part of a federal undertaking.³⁸ The Board considered five factors to be important:

- physical connection;
- ownership;
- operation;
- purpose of the gathering lines; and
- whether the gathering lines were part of the overall undertaking.

The resolution of this issue may have considerable importance to control of resources, since it determines not only the overall regulatory regime for the transport system, but also the extent to which other general laws (such as provincial mechanics or construction liens laws) apply. In Alberta the only gas gathering system (that of NOVA) has, so far, eluded the net of federal regulation, and any move in that direction would have enormous ramifications for the industry as a whole.

Fiscal Controls Over Resources

Given Canada's traditional economic reliance upon its natural resources, it is hardly surprising that the ability of each level of government to extract revenues from those resources was a fundamental issue in the energy wars of the 1970s and early 1980s. In this section, the extent of the power of each government will be analyzed, taking into consideration several recent landmark decisions and the changes wrought by s. 92A.

There are a number of methods by which governments may obtain direct fiscal benefit from resource extraction. These include the power of taxation, the power to extract royalties and other fees where government owns the resource, and the power to produce and market the resources as entrepreneur. The power to set the market price for resources can have a significant impact on the government's own income, as it can affect sums to be retrieved both by way of taxation and by way of royalty.

The extent of authority flowing from ownership of resources has been canvassed above, and will not be reiterated here. Two points, however, should be underscored. First, regardless of the extent of provincial proprietary rights, valid federal law can apply. Federal legislation pursuant to the trade and commerce clause could, in regard to interprovincial or international trade, limit otherwise valid lease or contract provisions imposed by the provincial proprietor. Similarly, federal legislation enacted in an emergency under the POGG power might invoke an overall fiscal regime which overrode an otherwise valid provincial royalty scheme.

Second, consideration must be given to the possible impact of s. 121 of the *Constitution Act, 1867*, which provides:

All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

It has been pointed out that it is unlikely that oil and gas, for example, would fall under s. 121 (Ballem, 1983, p. 551). Moreover, the opinion has been expressed that this provision is directed against the imposition of customs duties by an importing province (Ballem, id.). However, other commentators have pointed out that s. 121 could be given a broader reading, and "foreclose a royalty rate structure which contained differentials based on whether the production was destined for intra-provincial use or extra-provincial use."³⁹

Beyond these preliminary points, the power to tax resources is of most interest here. As outlined earlier, the original ss. 91 and 92 gave virtually unlimited taxation power to the federal government (s. 91(3)), while limiting the provincial power to the raising of direct taxes (s. 92(2)). Also relevant is the extent to which s. 125 of the Constitution protects the property and lands of one government from taxation by the other. This will be discussed later.

In order to understand the current taxing powers of each government, it is necessary to refer in slightly greater detail to the *CIGOL* case. The Saskatchewan government had enacted the *Oil and Gas Conservation Stabilization and Development Act*.⁴⁰ This imposed a mineral income tax upon oil produced from freehold land, and a royalty surcharge at the same rate upon oil produced from Crown land. It also expropriated freehold rights in substantial areas of the province. The legislation was

designed to capture for provincial coffers the significant increase in the price of oil. *CIGOL* attacked the legislation on the ground that it was not direct taxation pursuant to s. 92(5), but rather was regulation of trade and commerce, a matter within the purview of the federal government under s. 91(2).

Although Mr. Justice Dickson, in dissent, was prepared to uphold both the royalty surcharge and the mineral income tax as a direct tax and thus within the provincial powers, Mr. Justice Martland, writing for the majority, came to the opposite conclusion. He construed the charges as essentially an export tax imposed upon oil production, and relied upon earlier authority to conclude that they were indirect taxes (*CIGOL*, at p. 463). Moreover, great reliance was placed upon the fact that most of the Saskatchewan oil was exported. He felt that the charges thus regulated the export price, infringing upon the federal government's trade and commerce authority.⁴¹

The finding in *CIGOL* that the royalty surcharge was an invalid, indirect tax no doubt contributed to the adoption of s. 92A(4) in the resources amendment. This permits the provincial legislatures to impose any mode or system of taxation upon natural resources in the province and the primary production therefrom, "whether or not such production is exported in whole or in part from the province." Such laws may not, however, "authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province."

While s. 92A(4) will thus do away with the need to categorize a tax on resources as "direct" or "indirect," as Whyte has pointed out, it by no means solves all the problems. It is important to note that s. 92A in no way restricts the power of the federal government to pass valid laws under s. 91. Thus (Whyte, 1982, at p. 12):

. . . it remains a possibility that when the tax, regardless of legislative motive, affects the costs of goods moving largely extra-provincially, the courts will simply label the leading aspect of the legislation to be "Trade and Commerce". This possible outcome causes concern about the real benefit of section 92A(4). The legacy of *CIGOL* seems to be that when the process of characterizing challenged laws does not treat competing heads as equally important, there may be no means, through altering the constitutional text, to get around the characterization problem.

There is another, more practical problem that has not been (nor could it have been) resolved by s. 92A(4). This is the problem of "overtaxation" of the producer. Since both levels of government can now levy taxes of any type, there is the distinct possibility that the total government "take" will leave insufficient profit to the producer to make the activity economic. At the moment, both the producing provinces and Ottawa seem sensitive to this difficulty. Thus, for example, in the September

1981 Agreement, Alberta and Canada have come up with a total "package" of charges, and have undertaken not to alter these significantly during the life of the agreement. Nevertheless, in the absence of agreement, producers could again be caught in a squeeze between warring governments.

An important limitation on the power of both levels of government to levy taxes is contained in s. 125 of the *Constitution Act, 1867*, referred to above. This section provides that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

The most recent pronouncement upon this section is found in the *Gas Exports Tax Reference*. The case arose from one part of the National Energy Program (NEP) of October 1980, which imposed an excise tax of 30 cents per Mcf (the Natural Gas and Gas Liquids Tax (NGGLT)) upon all natural gas produced in Canada. As part of its strategy in resisting the financial terms of the NEP, the Alberta government set up a particular fact situation and referred to the Alberta Court of Appeal the question of whether the NGGLT would attach in this case. The facts were that provincial Crown gas was being produced from Crown wells (drilled by a contractor), then shipped by pipeline to the U.S. border, with actual title to the gas passing to the purchaser on the U.S. side of the border. This, of course, is not the typical way in which the industry is organized in Alberta; but the facts were designed to show that, if Alberta successfully resisted the NGGLT in this way, it could reorganize the industry and thus avoid federal taxation.

The Supreme Court of Canada, in a six to three decision, upheld the Alberta action. The Court held that the immunity conferred by s. 125 must override the express powers of taxation found in ss. 91 and 92.⁴² However, federal legislation that is in the form of taxation may nevertheless be binding on a province if it is in substance, and is primarily enacted, under another head of power. Thus, in the *Johnny Walker* case,⁴³ customs and other duties imposed by Canada could be levied upon alcoholic liquors imported by British Columbia for the purpose of sale. The Supreme Court, in the *Gas Exports Tax Reference*, explained *Johnny Walker* to mean that "customs duties on imported goods were viewed by their Lordships as primarily supportable under Parliament's constitutional authority to regulate trade and commerce. The fiscal immunity of the provincial Crown could not prevail with respect to federal legislation founded upon a head of constitutional competence other than s. 91(3)."⁴⁴

In the Alberta case, however, the majority scrutinized the primary purpose of the NGGLT, and concluded that it was essentially a revenue-raising device, as opposed to a regulatory tool. The dissenting judges, in contrast, saw the tax as being part of the broader thrust of the NEP, and thus valid under the Trade and Commerce or POGG authority of Parliament. It may be observed that the dissenting judges' view of the POGG power on these facts would have deprived s. 125 of almost all meaning.

While the Alberta case was litigated, other questions about the scope of s. 125 were not addressed, and remain unanswered. Both Saskatchewan and British Columbia have Crown corporations operating in the oil and gas production and distribution business, and thus are possibly liable to pay the NGGLT. Both governments refused to pay the taxes, and resort to litigation was a possibility (Whyte, 1982, p. 24). In the end, energy pricing agreements were reached, containing provisions whereby the "taxes" are paid to the federal Crown in the form of grants, with the Government of Canada agreeing not to collect the taxes.

As Whyte has pointed out (1983, p. 25 et seq.), these resolutions leave unanswered three important issues. First, what is taxation under s. 125? As discussed earlier, the *Johnny Walker* case suggests that a federal levy, if supportable under a head of s. 91 other than s.s. (2), may escape the web of s. 125.

Second, what entities are included under the term "province"? Although legislation makes many Crown corporations "agents" of the Crown creating them, the status of the subsidiaries of such corporations may be considerably less clear. In addition, does s. 125 shield the property of Crown corporations acquired in the process of competitive business, or does it apply only to property acquired in the course of conventional government operations? This sort of distinction, of course, is exceedingly difficult to apply, in view of the multitude of reasons that can cause a government to set up a Crown corporation.

Third, what is included in the term "property"? One theory is that it includes only that Crown property in existence at the time that a province entered Confederation. This would remove from the s. 125 immunity property acquired more recently, for example, by expropriation. It has also been suggested that the provision ought not to apply to transactions or to parties, but only to taxes on property per se. Such an interpretation would, however, render s. 125 meaningless.

Finally in the fiscal arena, a brief word should be said about pricing. It may be asserted that the federal government has the legislative authority to set prices for commodities moving into international and interprovincial trade by virtue of the trade and commerce power, while the provinces may set prices for resources produced and consumed within the province. Beyond this bald and perhaps obvious statement lurks a host of possibilities for disputes. An enormous number of tools to influence pricing were employed by the provinces during the 1970s, including the establishment of the Alberta Petroleum Marketing Commission and the British Columbia Petroleum Corporation. The provincial authority may arise by virtue of provincial ownership of resources. On the other hand, federal authority may be infringed by intra-provincial pricing where it can be shown that the purpose or effect of the provincial pricing scheme is to influence the price of goods outside the province.

In the past, these issues have been resolved by agreement between the two levels of government. However, the agreements are for finite terms,

and thus the issues may arise once again. As the earlier sections have indicated, the provinces may have greater opportunity to employ guerilla warfare tactics during future confrontations than they did prior to the passage of s. 92A.

Water and Other Environmental Matters

In view of the unexpected prominence of energy issues in the 1970s, it is perhaps not surprising that much of the federal-provincial wrangling over control of energy resources eventually found its way into the courts. Hindsight tells us that such methods of dispute resolution can have extremely unfortunate consequences. Most importantly, an unstable economic environment results; this can drive investment capital elsewhere, leaving behind a legacy of mistrust between industry and government. Thus, the uncertainty created by the absence of a clear constitutional framework for resources development appears to operate against the interests of all Canadians.

Although the above discussion has underscored those areas of constitutional law where uncertainties and ambiguities persist, one can nevertheless point to a line of judicial decisions for guidance in regard to the division of powers over in situ resources. The same, unfortunately, cannot be said of water and other common resources such as air. The constitutional uncertainty that surrounds these resources is extremely disturbing when one considers that their mismanagement can have devastating long-term ramifications. These may very well generate the "crisis" issues between now and the turn of the century. Yet there is a near vacuum in the law as to appropriate principles for resolving the federal-provincial and interprovincial disputes that loom on the horizon. The analysis that follows does not purport to be comprehensive. Rather, it is meant to illustrate the range and type of legal problems likely to face us over the next two to three decades. Moreover, while the discussion emphasizes the difficulties surrounding management of water, a similar catalogue of problems could be outlined in relation to other "environmental" resources.

When contrasted with in situ resources such as minerals, the problems arising from management of water seem highly complex. This is because many of our water resources are interprovincial and international in nature, and give rise to a mix of public and private rights. At common law, water is incapable of ownership. However, the common law recognized certain property rights in landowners bordering bodies of water. These rights of use, known as "riparian rights," exist today to the extent that they have not been abrogated by statute,⁴⁵ and provide an important backdrop for any discussion of governmental rights in relation to water.

The common law also recognized that the beds of streams and lakes were capable of ownership. Thus, it is generally acknowledged that

s. 109 and other constitutional measures granting provincial control over resources included ownership of stream beds within the respective provincial boundaries, to the extent that such property interests had not already been alienated privately. In a number of provinces, there has been a retroactive expropriation of stream and lakebeds through legislation.⁴⁶

The provincial authority arises from heads of powers discussed earlier: ss. 92(5) (management of provincial lands); 92(10) (local works and undertakings); 92(13) (property and civil rights in the province); and 92(16) (matters of a local nature). In addition, the Constitution gives the two levels of government concurrent jurisdiction in relation to agriculture, a point that could prove important in the context of irrigation projects.

The list of federal heads of authority is much longer, and would include ss. 91(2) (trade and commerce); 91(10) (navigation and shipping); 91(12) (seacoast and inland fisheries); 91(29) and 92(10)(a) (interprovincial works and undertakings); 91(27) (the criminal power); POGG, and the declaratory power.

The extent of these various powers in relation to water management has been analyzed extensively elsewhere, with differing points of view expressed as to the relative strength of the position of the respective levels of government.⁴⁷ The only consensus it is possible to identify is that both governments have legitimate bases upon which to ground certain legislative activity.

One of the most troubling unresolved issues is the appropriate role to be played by the federal government in the event of disputes between provinces sharing water resources. This issue could well arise over the next decade, given the Alberta government's interests in developing the hydro-electric potential of the Slave River — a move that could have serious impacts upon Saskatchewan, British Columbia, and the Northwest Territories. Other interprovincial disputes could erupt further south, in river basins currently governed by principles of allocation agreed upon by the Prairie Provinces — since, as the later discussion will show, the enforceability of such agreements is very much in doubt.

There is also a dearth of authority as to what body of law might be applied to resolve such disputes, as well as the appropriate principles to apply in the cases of interprovincial water pollution. The latter issue was raised in *Interprovincial Co-operatives Ltd. v. The Queen*,⁴⁸ along with issues of legislative jurisdiction.

In that case, the defendants operated chlor-alkali plants in Ontario and Saskatchewan under provincial permits. As a result of their operations, mercury wastes flowed into Manitoba, leading to the shutdown of the fisheries industry. The Manitoba government compensated the fishermen, and obtained a statutory assignment of their right to sue the defendants. This action was unsuccessful.

The Supreme Court of Canada, in dismissing Manitoba's claim, delivered three separate judgments which, taken together, leave us in considerable confusion as to the state of the law. Mr. Justice Pigeon, for himself and Martland and Beetz JJ., held that it was "equally impossible to hold that Saskatchewan and Ontario can license the contaminant discharge operations so as to preclude a legal remedy by those who suffered injury in Manitoba, or to hold that Manitoba can, by prohibiting the discharge of any contaminant into waters flowing into its territories, require the shutting down of plants erected and operated in another province in compliance with the laws of that province," (id. at p. 358). The resulting legal vacuum can, it seems, be remedied only by Parliament, because the subject matter in question is interprovincial in nature (id., at p. 357). Mr. Justice Pigeon also suggested that a similar conclusion would follow if the case involved dams in one province flooding lands in another (id., at p. 356).

Mr. Justice Ritchie reached the same conclusion by a different route. He found the Manitoba legislation *ultra vires* because "while the control of such [interprovincial] rivers is a federal matter, the legislation here impugned has to do with its effect in damaging property within the Province of Manitoba and it only becomes inapplicable by reason of the extra-territorial aspect to which I have made reference" (id., at p. 350). Three dissenting judges, however, would have upheld the law as a valid exercise of the province's right to protect within its boundaries.

Although, in the result, the precise scope of a province's power to deal with interprovincial waters within its boundaries remains unsettled, the courts have gone some distance toward resolving the sorts of issues that can arise in relation to disputes between federal and provincial resource use and protection. In the *Fowler* case,⁴⁹ a West Coast logger was charged with breaching s. 33(3) of the federal *Fisheries Act*⁵⁰ when, in his normal operations, he deposited certain debris in a stream frequented by fish. In a unanimous decision, the Supreme Court of Canada found the *Fisheries Act* provision to be *ultra vires* Parliament. The section in question had no requirement that debris deposited be in fact deleterious to fish, and thus the enactment could not be seen as necessarily incidental to fisheries regulation.

In contrast, s. 33(2) of the same Act was upheld in the companion case, *Northwest Falling*.⁵¹ The impugned section in that case prohibited only the deposit of "deleterious substances," and thus was restricted by its own terms to activities that are harmful to fish or fish habitat.

The *Fowler-Northwest* contractors distinction was applied recently in *The Queen v. Crown Zellerbach Can. Ltd.*⁵² In that case, certain provisions of the *Ocean Dumping Control Act*⁵³ were found to be not necessarily incidental to the federal fisheries power, nor valid as an implementation of a federal treaty. Moreover, they could not be supported under POGG because the affected waters (a cove off Vancouver Island)

belonged to the province and were subject to provincial management under s. 92(5).

Thus, while both governments appear to have a role to play in pollution control, each must be careful not to overstep the boundaries of its legislative authority, a task admittedly difficult given the relatively clouded nature of this area of the law.

The confusion over jurisdiction in the area of water pollution can give rise to problems on a practical level that can be economically disruptive. A good example of the double bind in which industry can find itself caught is the water pollution prosecutions of Suncor Inc., currently before the Alberta courts. Suncor's oil sands plant in northern Alberta had been licensed under the provincial *Clean Water Act*⁵⁴ to discharge certain effluents into the Athabasca River. Discharging these effluents in excess amounts (as a result of a fire at the plant which caused technical problems) led to charges being laid against Suncor under the provincial legislation (for exceeding the licence limits, and failing to report), as well as under the *Fisheries Act*. The company obtained four *Fisheries Act* acquittals and one provincial acquittal based on the defence of due diligence, and a number of federal charges were stayed by the Crown due to insufficient evidence. Convictions were entered on one federal and one provincial charge. Both of these are under appeal. Two additional *Fisheries Act* charges have been tried and judgment is pending.

Two major problems of relevance to our discussion emerge from the Suncor prosecutions. One is that both the federal and provincial laws are being enforced by provincial agencies. The provincial laws are enforced by the Department of the Environment, while the *Fisheries Act* is enforced in Alberta by the Fish and Wildlife Branch of the Department of Renewable Resources. This can cause serious administrative problems. For instance, it is well known that Alberta Environment views prosecutions as a last resort, and prefers to negotiate with polluters. To the extent that this policy differs from that applied in the enforcement of the federal law, it is obviously difficult for an industrial user to feel comfortable about the actions it takes to deal with pollution.

Perhaps more serious is the problem of conflicting federal-provincial standards. Although the *Fisheries Act* provides for the setting of regulations to authorize discharges by particular industrial groups, there are no such regulations in effect for oil sands plants. Thus, although within provincial law, a company could nevertheless be in breach of federal law. Where the federal law is supportable, for example under the fisheries power, the doctrine of paramountcy would suggest that the federal standard should prevail. However, the legal answer does not really solve the practical question, which is how federal and provincial pollution standards and policies can be harmonized to provide an environment of certainty in which industry can operate.

This problem also arises in another context, namely acid rain. Here

the uncertainty relates to the extent of the federal government's powers, by itself, to enter into a treaty with the U.S. government that would bind the provincial governments. Although the matter is not entirely free from doubt, the better view would seem to be that the federal government's treaty power does not extend to matters within the exclusive jurisdiction of the provinces under s. 92 of the *Constitution Act*.⁵⁵ If this view is correct, it poses serious obstacles for federal initiatives on an international front in those areas where the scope of federal legislative authority remains cloudy. Few areas are so subject to uncertainty as the environmental field, and yet there are also relatively few areas where the need for international solutions is so apparent.

Techniques for Coping with Constitutional Rigidities

Introduction

This section deals with some of the techniques that have been employed by both levels of government to achieve an allocation of responsibilities for natural resources development that might arguably be precluded by a literal interpretation of the division of powers in the Canadian Constitution. As indicated at the beginning of this paper, our discussion is of necessity highly selective. Faced with the choice between a superficial cataloguing of the various means by which federal and provincial governments together (whether cooperatively or not) generate policies (whether integrated or piecemeal) in the Canadian federal system, and a more limited, but also more detailed, discussion of some of the more significant techniques that have been employed in the natural resources sector, we have opted for the latter.

In selecting techniques for discussion, we have exercised a bias in favour of those that raise the more interesting legal questions and/or are more formal and visible. Thus, for example, we do not discuss the phenomenon of on-going consultations between federal and provincial bureaucrats over a wide range of issues. This does not deny the vital importance of such links in a federal state, but we do feel that it is an area that raises questions that have a relatively small legal component.

This section then suggests six "techniques" that have been used by governments to achieve what they regard as an appropriate role in shaping natural resources policy and development. These are:

- intergovernmental agreements,
- non-exercise of power,
- exercise of proprietary rights,
- public corporations,
- commissions of inquiry, and
- reference cases.

Each of these is discussed in turn, with the emphasis placed upon legal aspects of the techniques and with illustrations drawn primarily from their application to the natural resources problem.

Federal-Provincial and Interprovincial Agreements

NATURE OF AGREEMENTS

Intergovernmental agreements have long been used in the Canadian Confederation for a variety of purposes.⁵⁶ They have been used to resolve constitutional disputes between two levels of government, to provide for federal grants-in-aid to the provinces, and to allocate responsibilities for delivery of services and the administration of statutory schemes. The formality of the agreements is equally varied. At one extreme are the Natural Resources Transfer Agreements of 1930 with the Prairie Provinces which were confirmed by the *Constitution Act, 1930*.⁵⁷ At the other extreme are informal arrangements such as a 1965 agreement between Alberta and the federal government with respect to drill cutting samples.⁵⁸ Somewhere in between these two extremes are agreements that may be scheduled to statutes⁵⁹ or orders in council,⁶⁰ and agreements which, although not granted any formality, create legally enforceable obligations between the two parties. More difficult to place are political agreements which expressly disavow any intention to create legally binding obligations or perhaps to change the legal position of the parties. An example of this latter type of agreement is the Agreement Between the Government of Canada and the Government of Nova Scotia Relating to Oil and Gas Resource Management and Revenue Sharing.⁶¹ Section 1 of the agreement noted that:

This political settlement of the issues between the two governments has been reached without prejudice to and notwithstanding their respective legal positions. It is the intention of the parties that this settlement shall survive any decision of a court with respect to ownership and jurisdiction.

In this section of the paper we shall consider some important examples of intergovernmental agreements in the energy and natural resources field. It is our view that these agreements can be, and have been, used to "lubricate" the Constitution and to circumvent some of the difficulties caused by judicial interpretation of the division of powers. After a descriptive analysis of some of these agreements we shall consider some of the constitutional limitations inherent in the use of agreements. Included in the latter section will be a review of constitutional restrictions on interdelegation of legislative and administrative responsibilities between the two levels of government.

TYPES AND EXAMPLES OF AGREEMENTS

Many intergovernmental agreements are designed to resolve some problems caused by Canada's divided jurisdiction. In unitary states these problems might be dealt with by interdepartmental agreements or simply by delegating authority or jurisdiction, but these techniques are not always legally available in a federal jurisdiction. The nature of the problems dealt with by agreements has varied even in the relatively limited context of the energy and natural resources law field. Because of their variety, it is not possible to rigorously categorize these agreements; suffice it to say that they cover such subjects as:

- agreements to resolve or put aside legal disputes;
- agreements for the transfer of property or resources;
- resource management agreements;
- agreements to fund particular resource or resource-related activities; and
- agreements to allocate resource revenues.

As examples of interjurisdictional agreements we shall discuss the Alberta-Canada pricing agreement, the Canada-Nova Scotia agreement, and a variety of agreements in the areas of forestry, water resources, and mining.

Pricing Agreements

The best known example of an interjurisdictional agreement in recent years is the Energy Pricing and Taxation Agreement of September 1981 between Alberta and Canada.⁶² It is useful to consider the background and substance of this agreement in order to illustrate the important role that agreements play in resolving disputes and uncertainty in the Canadian federal structure.

Prior to 1975 there were no federal-provincial pricing agreements with respect to either oil or natural gas.⁶³ The market established price with the exception that from 1950 onward Alberta had a system of market demand prorationing and from 1961 until the rapid increase in world oil prices, the Canadian market west of the Ottawa Valley was reserved for domestically produced oil. The price increases of the 1970s brought about conflicting demands from the producing and consuming provinces. The producing provinces wished to see the price of their oil raised as quickly as possible to the world price, whereas the consuming provinces wanted the price kept down so as to buffer the central Canadian manufacturing industries. Initially, in 1973, the federal government attempted as a temporary measure to fix unilaterally the price of oil, but further price increases were agreed upon at federal-provincial First Ministers' Conferences.⁶⁴ After failing to achieve agreement at the April 1975 First Ministers' Conference, the first of a series of Alberta-federal oil pricing agreements was negotiated. Successive agreements

with respect to both oil and gas were negotiated between 1975 and the eventual breakdown of negotiations in 1980. Further agreement on energy pricing was not reached until September 1981 and in the interim the federal government unilaterally established the price of oil and gas in interprovincial trade.⁶⁵

The pricing of resources is, of course, a matter of acute concern to both the federal and provincial governments. The province wishes to realize the full market value of its scarce natural resources. In making its claim to influence price, the province relies upon its proprietary rights under s. 109 of the *Constitution Act, 1867* and its right to legislate under s. 92(5). The province does not have the authority to control price unilaterally under s. 92 but it can (as Alberta did) strengthen its hand in the negotiations by restricting production of those resources,⁶⁶ thereby withdrawing them from interprovincial trade.

Other questions were also at issue at the time of the impasse in 1980, notably the division of resource revenues between the two levels of government. The relatively rapid increase in price during the 1970s had seen each government attempt to take a share of "the unearned increment" that would otherwise accrue to the producers. The federal government stated in its October 1980 National Energy Program that it considered the existing distribution of revenues to be inequitable.⁶⁷

When each level of government has certain rights to revenues, whether the revenues be taken in the form of bonus payments, royalties, severance taxes, export taxes, or "petroleum and gas revenue taxes," there is no correct legal or constitutional answer to the question: what is an equitable distribution of revenues between the two levels of government?⁶⁸ However, failure to answer this question or, more appropriately, to come to some agreement about what the answer to the question might be from time to time, may have dire consequences for an industry attempting to operate in this regulatory framework. The possibility exists that the two governments may collectively erode the profitability of conducting any activity within the jurisdiction. Even if this possibility is never realized, the risk may be sufficient to discourage investment.

A number of constitutional problems were therefore posed by the pricing impasse of 1980, and were addressed in the September 1981 Agreement. Two issues will be considered here: the content and form of the agreement, and the legislative basis of the agreement. Where appropriate, reference will be made to the taxation and pricing agreements negotiated contemporaneously with Saskatchewan and British Columbia. Although both of these agreements generally adopt the conclusions of the Alberta Agreement, there are some significant differences that merit attention.

Content and form. In practical terms, the most important part of the September 1981 Agreement was the determination of a schedule, accept-

able to both governments, of price increases for conventional old oil, new oil reference price oil, and natural gas. At the very least this represents a political acknowledgment that both levels of government have a legitimate involvement and interest in price setting. The second major concern of the agreement was to develop a consensus as to revenue sharing between the two levels of government. This was achieved by mutual recognition of the intent that neither party would "introduce any tax, royalty or levy specific to the oil and gas producing industry, other than those set out in this Agreement," or alter incentive payments in a significant manner (September 1981 Agreement, at para. 14). Each government reserved the right to alter the components of its share of the take (i.e., royalties, taxes, and incentives payments) but not so as to significantly reduce the aggregate revenue flowing to either the other level of government, or the industry.

This agreement to share government revenues and protect the industry share creates a politically stable environment for industry investment. However, one may well question whether these governmental undertakings are binding inter partes. A complete answer to this question would take us beyond the scope of this paper,⁶⁹ but some considerations might be mentioned. First, did the governments actually intend to enter into a legally binding agreement? Second, the agreement could not limit the sovereignty of either the provincial legislature or Parliament. So in the event that either government increased its take of the share of revenues (either legislatively or by executive means), the other government would not be able to restrain this apparent breach of the agreement.⁷⁰ A related problem is the extent to which agreements of this nature can bind third parties. We shall refer to this question again, but it is certainly unlikely that a third party would be able to rely upon the September 1981 Agreement to challenge federal or provincial legislation on the grounds that, for example, a new tax caused a significant reduction in aggregate revenues flowing to the industry.⁷¹

The September 1981 Agreement was not limited to pricing and revenue sharing, but also attempted to resolve a number of contentious matters including production levels (September 1981 Agreement, at para. 15), the Petroleum Incentives Payment program payments (id., at para. 12), treatment of gas exports (id., at para. 4), and the reduction of specific taxes. With respect to production levels, it will be recalled that in 1980, the Alberta government imposed restrictions on the production of petroleum on Crown leases pursuant to s. 116 of the *Mines and Minerals Act*, in order to put pressure on the federal government. The September 1981 Agreement purported to limit the Alberta government's discretion by providing that, during the agreement, "oil and natural gas production in Alberta will be at levels consistent with sound engineering practices."

The Petroleum Incentives Payment (PIP) program was a particular concern of the provincial government because of the influence it might

exert on the industry to concentrate exploration in particular areas of Canada, and presumably because of a provincial fear that the PIP program might be used to justify a larger share of resource revenues accruing to the federal government.⁷² The Alberta Agreement provided that Alberta would administer and fund the PIP program within the province. However, the scope of Alberta's discretion in developing and administering the program was quite limited since the basic program was to be devised by the federal government. Nevertheless, the agreement specified areas of joint and shared authority and called upon the parties to cooperate in the implementation and amendment of the program.

The PIP program illustrates the use which the federal government can make of its financial resources to effectively coerce certain provinces to adopt a scheme, the main parameters of which have been determined by the federal government, or to tolerate a scheme administered by the federal government itself. The surprising element of the Alberta Agreement was that Alberta proved willing to shoulder the financial cost of the program in return for slightly increased control. The provincial willingness to fund the incentives was of some value in that it undermined the federal argument that it required a greater share of resource revenues in order to be able to pay for its support of the oil and gas industry. A different approach was taken in the pricing agreements negotiated with Saskatchewan⁷³ and British Columbia.⁷⁴ In each province the federal government agreed to fund the PIP program.

The imposition of the Natural Gas and Gas Liquids Tax (NGGLT) was a contentious item for all three producing provinces. It will be recalled that the province of Alberta successfully tested the application of the tax to gas exported from the province but owned by an agent of the Crown. However, judgment in this case was not given by the Supreme Court of Canada until June 1982 (*Gas Exports Tax Reference*). Thus, in the Alberta Agreement, the federal government agreed "to reduce the NGGLT to a zero rate on exports of natural gas originating in an agreeing province" (September 1981 Agreement, at para. 7). The reduction was expressed to be without prejudice to the legal position of the federal government. Similar clauses were included in the Saskatchewan and British Columbia agreements. However, these latter two provinces also contested the application of the NGGLT and the Canadian Ownership Special Charge (COSC) to agents of the provincial Crown and every person acting on behalf of the Crown. The resolution of the dispute with respect to Saskatchewan is particularly interesting. The federal government agreed to remit the two taxes from November 1980 (date of the agreement) and the Saskatchewan government agreed to pay grants in lieu of the taxes from the date of their imposition until October 1980. In addition the Saskatchewan government agreed to provide all the information and other material which would have been required under the NGGLT and COSC.⁷⁵

The Alberta Agreement contains an unusual example of what may be called a provincial conditional grant. The province undertook to make market development incentive payments to the federal government "to encourage the expansion of gas markets in provinces east of Alberta." The federal government in turn bound itself to expend the monies only as specified in the agreement. The scheme was designed to increase consumption of Alberta gas in central Canada and is an interesting example of a provincial grant with respect to an extra-provincial matter that falls within the federal government's trade and commerce jurisdiction.⁷⁶ The provincial policy here was also in harmony with the federal government's "off-oil policy" enshrined in the National Energy Program and was closely linked to the federal government's commitment to restrict its NGGLT to a level that would maintain gas prices at the Toronto City Gate at approximately 65 percent of the crude oil equivalent price.

The September 1981 Agreement resolved a number of disputes between the two parties. It illustrates the need for federal-provincial cooperation when both levels of government have strong but conflicting bases on which to assert jurisdiction. The agreement was largely based on a recognition of this overlap and was not really occasioned by a clear dispute as to ownership or jurisdiction which might be said to characterize the Nova Scotia Resource Management and Revenue Sharing Agreement. Certainly there were disputes as to the precise extent of the regulatory powers of each level of government and the effect of provincial ownership rights, but each government had a solid core of undisputed jurisdiction. The achievement of the Alberta Agreement was to delimit the proper extent of each government's jurisdiction for the specific purposes and time period stated in the agreement.

Legislative basis of the Alberta Agreement. To what extent does an agreement such as this require specific legislative sanction? If it is merely a political agreement between the parties, then it would seem to follow that no specific legislation would be required since such an agreement would be nothing more than an executive act. On the other hand, to the extent that specific action was required by either government (or agent of either government), it would be necessary to contemplate implementing or sanctioning legislation.⁷⁷ Legislation would also be required to the extent that the agreement was intended to bind third parties.

The federal position is quite straightforward. Parts II and III of the *Energy Administration Act* (S.C. 1974-75-76, c. 47, as am.) give the minister of energy, mines and resources the power, with approval of the governor-in-council, to enter into agreements with producing provinces for establishing mutually acceptable prices for oil and gas, respectively. Agreed prices would then be prescribed by federal regulation. The federal legislation is narrowly phrased and is limited to pricing. It does

not specifically authorize agreement on many of the subjects of the September 1981 Agreement.

Provincially, the only specific statutory authorization in Alberta is contained in the *Natural Gas Pricing Agreement Act*, R.S.A. 1980, c. N-4, which, as the name implies, applies only to natural gas. The minister of energy and natural resources is given the power, with the approval of the lieutenant-governor-in-council, to enter into an agreement with the government of Canada "for the purpose of establishing prices for the various kinds of gas during any period and for any other purposes related to the provisions of this Act." A 1981 amendment to the act specifically stated that any such agreement might include provision for market development incentive payments.⁷⁸ Somewhat surprisingly there is no comparable provision for oil pricing agreements. Consequently, the provincial government must be relying upon its executive or prerogative powers in the negotiation of agreements relating to oil pricing. However, provincial authority to discharge its responsibilities under the 1981 and previous agreements is provided through the *Petroleum Marketing Act*.⁷⁹ The act established the Alberta Petroleum Marketing Commission which has a role to play in the September 1981 Agreement by determining the ultimate field price for Alberta oil.

The Canada–Nova Scotia Agreement on Oil and Gas Resources Management and Revenue Sharing

The other major agreement negotiated in the energy and natural resources area over the last several years is the Canada–Nova Scotia Agreement of March 2, 1982.⁸⁰ The Nova Scotia Agreement established a joint resource management and revenue sharing regime for the offshore area. The immediate impetus for the agreement was the unresolved dispute between Nova Scotia and the federal government concerning title to, and jurisdiction over, the resources of the territorial sea and continental shelf adjacent to the province.

The intent of the agreement was to put aside the unresolved legal issues and develop a joint framework for resource management and revenue sharing that would outlast any final judicial determination of ownership and control. Consequently, the agreement shares responsibilities and revenue sources which, were there to be a judicial solution, might be the exclusive preserve of the federal government or might be shared on a different basis.

The agreement is a very pragmatic solution to a problem of legal and constitutional uncertainty and the technique used merits close examination.

Content and form. The primary concern of the agreement is with revenue sharing and resource management. Essentially, all resource revenues flow to the provincial government until the province reaches "have" status, which is defined by reference to national per capita fiscal

capacity (Canada–Nova Scotia Agreement, at s. 15). Beyond this point revenues are shared with the federal government. Responsibility for resource management is shared between the two governments through the mechanism of the “Canada–Nova Scotia Offshore Oil and Gas Board” (id., at s. 3). The board, which has three federal and two provincial representatives, essentially exercises the discretionary powers of the minister under the federal *Canada Oil and Gas Act*, S.C. 1980–81–82–83, c. 81. Although the federal government has a majority on the board, the Nova Scotia members have specified delay and veto powers (Canada–Nova Scotia Agreement, at para. 66501). Special provisions apply to Sable Island and the Bay of Fundy.

The agreement is not confined to the above matters but calls for federal-provincial cooperation on a whole range of issues. For example, the agreement provides that the parties shall establish “a cooperative environmental assessment hearing process which meets both the federal Environmental Assessment Review Process (EARP) requirements and Nova Scotia environmental assessment requirements” (id., s. 8(b)). Pricing is dealt with cursorily but firmly by the provision that the federal government may establish prices subject only to consultation with the Nova Scotia government (id., s. 16). Also interesting from a constitutional perspective is the provision that “end-use” Nova Scotia industries and consumers are to have first call on hydrocarbons produced from the offshore region (id., s. 11). However, feedstock for new Nova Scotia industrial facilities will be allocated only if the supply is in excess of feedstock required to meet the demand of existing industrial capacity in Eastern Canada. This would seem to represent an attempt by the federal government to protect existing petrochemical plants in Ontario and Quebec. In addition, the federal government undertakes to accord offshore areas fair and equitable treatment when considering gas export proposals.⁸¹ Finally, both governments agree to waive the tax and royalty immunities of their Crown corporations or to make grants in lieu.

The legislative technique. The legislative technique adopted to implement the scheme is posited on the state of constitutional uncertainty that the parties found themselves in. Certainty and uniformity of legislation is to be attained by mirror use of the federal *Canada Oil and Gas Act* and the *Oil and Gas Production and Conservation Act*, R.S.C. 1970, c. 0-4. At present the *Canada Oil and Gas Act* clearly purports to apply to areas offshore of the provinces and to clarify the matter the Nova Scotia government (Canada–Nova Scotia Agreement, s. 17(d)) agreed to:

. . . ask the provincial Legislature to adopt the Canada Oil and Gas Act and the Oil and Gas Production and Conservation Act, as they may be amended from time to time, with such modifications as may be necessary in respect to the offshore region.

In effect, the parties were required to introduce mirror legislation with associated delegations of ministerial powers to the Canada–Nova Scotia Board.⁸²

Nova Scotia has introduced its mirror legislation and has enacted broad empowering legislation in the form of the *Oil and Gas Agreement Act*.⁸³ The act, once proclaimed, empowers the governor-in-council:

- to do every act and exercise every power and expend every sum of money necessary or proper for the purpose of implementing in every respect every obligation assumed by the province under the agreement;
- to do and perform the acts, matters and things in the agreement provided to be done or performed by the province;
- to authorize the minister of mines and energy to make any request, to give any notice or direction, to grant or withhold any approval or consent, or to do any other act or thing required or permitted to be done by the province by or under the agreement.

In the absence of specific implementing legislation, the parties agreed to govern themselves by its spirit. The implementing legislation was introduced by both levels of government on May 31, 1984.

The Canada–Nova Scotia Agreement is a political agreement that puts the constitutional question to one side. As a pragmatic solution to a difficult problem, the agreement seems to have been remarkably successful in clearing up uncertainty and inducing oil companies to negotiate new offshore exploration agreements and invest heavily in the Sable Island area. The agreement illustrates a useful technique available to governments when their respective constitutional rights are doubtful and uncertain, but when either one or the other (or both together) must have full legislative jurisdiction and sovereign rights.

Other Agreements

Before reviewing some of the constitutional limitations on interjurisdictional agreements, mention should be made of the range of other agreements that have been executed in the field of natural resources and energy to facilitate interjurisdictional cooperation and wise management of resources.

Water agreements. A particularly active field for formal intergovernmental agreements has been water resources management and allocation. That this should be so is not surprising given uncertainty as to the precise legal rights of the different jurisdictions that may have a territorial share of the water basin. Some of these agreements are interprovincial in scope rather than simply federal-provincial. An example is found in the agreements between Saskatchewan, Manitoba, Alberta, and the federal government, which together constitute the Prairie Prov-

inces Water Apportionment Agreement.⁸⁴ The agreement allocates surface water among the three provinces and establishes the Prairie Provinces Water Board with specified responsibilities. The board, which has a small secretariat, has proved to be an important forum for continuing consultation between the parties on such matters as water quality, water supply, and water demand. The actual implementation of the agreement is largely left to the individual provinces in accordance with the relevant constituent agreements. These agreements envisage a formal dispute resolution mechanism with the possibility of submitting disputes to the Federal Court (Barton, 1983).

The Apportionment Agreement provides an excellent example of the resolution of a difficult resource problem. There was constitutional uncertainty as to the rights of the respective parties and the matter was not one that readily lent itself to judicial resolution. Certainly a court might have been able to identify the rights of the parties with greater clarity but that alone would not have removed the need for an agreement and would not necessarily have made it any easier to reach agreement.⁸⁵

Other interjurisdictional agreements (although not concerned with allocation) have been negotiated in the area of water resources pursuant to the terms of the *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5. The *Canada Water Act* is particularly significant as a relatively recent statute which, in its preamble, explicitly recognizes the necessity of federal-provincial cooperation:

. . . WHEREAS the Parliament of Canada is desirous that . . . comprehensive programs be undertaken by the Government of Canada and by the Government of Canada in cooperation with provincial governments, in accordance with the responsibilities of the federal government and each of the provincial governments in relation to water resources for research and planning with respect to those resources and for their conservation, development and utilization to ensure their optimum use for the benefit of all Canadians.

The act provides the federal legislative authority for the negotiation of a series of federal-provincial agreements with respect to water resource management and consultation and water quality. The act also specifies guidelines as to the expected content of such agreements including apportionment of responsibilities and costs. A number of water basin studies have been launched under the auspices of the act, and in some cases predating it.⁸⁶ These include the Mackenzie River Basin Agreement,⁸⁷ the Yukon River Basin Agreement,⁸⁸ the Saskatchewan-Nelson Basin Agreement, and the Northern Ontario Water Resources study. Numerous agreements have also been negotiated between the two levels of government with respect to flood control and prevention.⁸⁹ These agreements provide for matters such as flood forecasting and mapping and taking appropriate mitigative action such as the improvement of dykes.⁹⁰

The legislative authority for such agreements is found in the *Canada Water Act* and associated federal and provincial water statutes that explicitly recognize the need for federal-provincial cooperation and agreements in this area. For the most part the modern statutes⁹¹ clearly mandate officials to seek negotiated solutions to problems which have no single jurisdictional answer.

Mineral agreements. In the areas of forestry and mining, federal-provincial agreements tend to be more limited in scope and number. This is undoubtedly because of the restricted nature of federal jurisdiction over both resources, by comparison with water. In the area of mining, past disputes have centred on the direct-indirect tax dichotomy (which has now withered away as a problem with the adoption of s. 92A) and provincial marketing plans such as the Saskatchewan potash prorationing plan. Many of the older agreements for both mining and forestry were negotiated as subsidiary agreements within the general framework of Department of Regional Economic Expansion (DREE) General Development Agreements.⁹²

The mineral development agreements negotiated with the provinces made provision for the conduct of geological surveys, studies of smelter feasibility, and resource development planning and assessment.⁹³ Costs of the studies and surveys were shared between the parties on an agreed basis.

The focus of the "new generation of federal-provincial Mineral Development Agreements" does not seem to have changed markedly. In a May 1984 speech, the Honourable William Rompkey, the federal Minister of Mines, described the new agreements as having three basic elements. First, the agreements would provide for highly targeted geoscientific studies rather than more general studies. Second, the agreements would promote the development of new technology and, third, they would "delineate opportunities for development through market and feasibility studies on particular commodities."⁹⁴ Other agreements are limited to such things as satellite exploratory techniques for minerals, and occupational health and safety.⁹⁵

In summary, the aim of these agreements is the general stimulation of the mineral economy by both levels of government. They may be characterized as conditional grants and do not have the broad constitutional function of the pricing agreements or the Nova Scotia Agreement.

Forestry agreements. Federal-provincial forestry agreements are also limited in scope and have a similar background in the DREE subsidiary agreements. These DREE agreements negotiated during the 1970s and 1980s provided for matters such as access-road construction, improvement of provincial forest service, protection against fires and disease and, in some cases, intensive forest planting management programs.⁹⁶

The federal constitutional position with respect to forestry is stated succinctly in the 1981 publication *A Forest Sector Strategy for Canada*:⁹⁷

Constitutional Issues

144. The provinces own most of Canada's productive forest land and carry the responsibility for seeing that it is managed to an acceptable level. Their jurisdiction, including the right to allocate or sell timber, is accepted without qualification. Forestry relations between the provinces and the federal government have tended to be harmonious, even during recent constitutional debates and related discussions on resource policy.
145. At the same time it is recognized that the federal and provincial governments share the responsibility for the economic and regulatory climate in which forest management and industrial activity are carried out. This can lead to tensions, for example in the interpretation of fisheries legislation, the application of environmental regulations, and the registration of pesticides for use in forestry. There are outstanding issues in these areas now and they should be dealt with promptly.

Recent federal policy initiatives have called for a new generation of federal-provincial forestry agreements.⁹⁸ Two such agreements have recently been negotiated with the provinces of Nova Scotia (the Canada–Nova Scotia Agreement) and Prince Edward Island (the Canada–Prince Edward Island Agreement, July 29, 1983). Both agreements provided for federal funding of specifically identified programs for forest management and renewal. Activities contemplated include seedling production, stand improvement, and silvicultural developments. Such agreements are negotiated under the federal authority of s. 6(3) of the *Department of the Environment Act*, R.S.C. 1970 (2nd Supp.), c. 14, as am., which permits the minister of the environment, with the approval of the governor-in-council to “enter into agreements with the government of any province or any agency thereof respecting the carrying out of programs for which the Minister is responsible.”

*Constitutional Limitations on Federal-Provincial Agreements*⁹⁹

Interjurisdictional agreements constitute a much needed lubricant for any federal system, given that there will always be problems of overlapping jurisdiction and differing interpretations of the division of powers. However, neither level of government is constitutionally unfettered in its use of these agreements, particularly where they have the practical effect of amending the Constitution. At least two possible restrictions exist. First, there are restrictions that the courts have imposed on the federal “spending power” and second, there are restrictions on the interdelegation of legislative authority. We shall examine both of these doctrines and consider what application each may have to agreements in the natural resources and energy fields.

RESTRICTIONS ON THE FEDERAL SPENDING POWER¹⁰⁰

Federal contributions to the provincial governments in accordance with a federal-provincial agreement generally have one element in common. They are designed to fund (or partially fund) programs that lie within provincial jurisdiction, but in accordance with terms and conditions which, although agreed upon by both parties, will generally be developed unilaterally by the federal government. Is this "spending power" unlimited? The leading case on the subject is the *Unemployment Insurance* case.¹⁰¹ It tested the validity of a federal statute that provided a fund for unemployment insurance financed by the federal treasury and compulsory contributions from employers and employees. The Dominion alleged that the compulsory contributions were simply a form of tax. The Privy Council met this argument with the following statement (at pp. 366-67):

That the Dominion may impose taxation for the purpose of creating a fund for special purposes, and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities, could not as a general proposition be denied. . . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.

It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be ultra vires. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province, or encroach upon the classes of subjects which are reserved to Provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the Provincial domain. In the present case, their Lordships agree with the majority of the Supreme Court in holding that in pith and substance this Act is an insurance Act affecting the civil rights of employers and employed in each Province, and as such is invalid.

The case has since been subject to a rather narrow interpretation. Hence, it has been noted that the scheme in question was compulsory and contributory and that the Privy Council expressly found that the legislation was "in pith and substance an insurance Act affecting the civil rights of employers and employed in each province" (La Forest, 1969, p. 140). Professor Hogg has gone so far as to suggest that provided the legislation is not compulsory in nature the federal spending power is essentially unfettered (Hogg, 1977, p. 71).

There is a distinction, in my view, between compulsory regulation, which can obviously be accomplished only by legislation enacted within the limits

of legislative power, and spending or lending or contracting which either imposes no obligations on the recipient (as in the case of family allowances) or obligations which are voluntarily assumed by the recipient (as in the case of a conditional grant, a loan or a commercial contract). There is no compelling reason to confine spending or lending or contracting within the limits of legislative power, because . . . the government is not purporting to exercise any peculiarly governmental authority. . . .

La Forest seems to support the general tenor of this position but takes the view (1969, p. 142) that there may still be some restrictions if for example the Dominion "sought by means of grants to introduce its own system of education. . . ." The general conclusion therefore is that provided a scheme is voluntary, and provided that it does not purport to entirely replace a provincial scheme, the exercise of the federal spending power will not be questioned by the courts. The same considerations would apply to the provincial spending power. Thus the dedication of a portion of Alberta revenues to the federal government, for market development incentive payments for Eastern Canada (see *supra*, text to note 76), would seem to be a legitimate expenditure of provincial funds. It is not intended to subvert federal policy or legislative initiatives in the field, and in fact complements them.

The federal Petroleum Incentives Program (PIP) is an interesting case in point.¹⁰² It provides direct grants to the petroleum industry for allowed exploration expenses which vary with geographical location and Canadian ownership and control status. Although the program has undoubtedly had the effect of shifting some exploration activity from the provinces to the federal lands, it cannot be considered a direct interference with provincial ownership and resource management rights. Nevertheless, it is notable that the PIP program was specifically considered in all three producer province pricing agreements, most importantly as part of the package of revenue sharing between the two levels of government.

Similar arguments apply to the federal-provincial forestry and mining agreements considered earlier. These agreements provided for federal financing for specific projects. In each case the terms of the grant are hedged with all manner of terms and conditions. Once again though, there cannot be said to be an overt interference with provincial legislative jurisdiction or ownership. The province is free to reject the federal offer even though it may, in practice, be difficult to refuse.

RESTRICTIONS ON INTERDELEGATION¹⁰³

In the past, federal and provincial governments have attempted to get around the division of powers in the *Constitution Act, 1867* by delegating required powers to another level of government. It has been held that legislative interdelegation is invalid insofar as it tends to enlarge the

jurisdiction of one level of government or cause a surrender of jurisdiction from another level of government. Thus in *Attorney-General Nova Scotia v. Attorney-General Canada*, ([1951] S.C.R. 31) an act for the delegation of jurisdiction from the Parliament of Canada to the Legislature of Nova Scotia, and vice versa, which related to a contributory old age pension scheme, was struck down. However, shortly after the *Nova Scotia* case the Supreme Court of Canada upheld a scheme of administrative interdelegation in *Prince Edward Island Marketing Board v. Willis* ([1952] 2 S.C.R. 392). The federal *Agricultural Products Market Act* provided for the delegation to the provincial marketing board of the power to regulate the marketing of agricultural products "outside the province in interprovincial and export trade." Pursuant to the statute, regulatory powers were delegated to the Prince Edward Island Potato Marketing Board, a creature of the provincial statute. The Supreme Court considered that this was a perfectly valid example of the undoubted power of both federal and provincial governments to delegate administrative and regulatory functions to subordinate agencies. There was no reason why this should not encompass a federal delegation of functions to a provincial agency which had been empowered to accept such a delegation.

The same conclusion was reached by the majority of the Supreme Court of Canada in *Coughlin v. The Ontario Highway Transportation Board*, [1968] S.C.R. 569. In this case the federal *Motor Vehicle Transport Act* gave the provincial board the right to issue a licence to an extra-provincial undertaking in the same manner "as if the extra provincial undertaking . . . were a local undertaking." Mr. Justice Cartwright commented (at p. 575, *id.*) that:

. . . there is here no delegation of law-making power, but rather the adoption by Parliament, in the exercise of its exclusive power, of the legislation of another body *as it may from time to time exist*. (emphasis added)

Hence, although legislative interdelegation is outlawed, it appears that very extensive delegation of administrative powers by shell legislation is valid.

In the resources law field, some interdelegation has occurred with respect to natural resources on Indian reserve lands, notably in Ontario and British Columbia by virtue of statutorily approved agreements in 1924¹⁰⁴ and 1943,¹⁰⁵ respectively. In both cases there may be an element of legislative interdelegation insofar as the agreements purport to allow the province to legislate for "lands reserved for the Indians."¹⁰⁶ In the area of fisheries, which has raised peculiar problems of division of powers requiring some innovative solutions, a scheme of legislative interdelegation in British Columbia was recently struck down in the *Tenale* case.¹⁰⁷ The scheme was *ultra vires* because the provincial minister of recreation and conservation was designated as the responsible minister for exercising certain important discretionary powers in the

British Columbia Fishing (General) Regulations. Andrew Co. Ct. J. held that while it was valid to delegate duties to a provincial ministry to carry out the intent and objectives of a federal statute, s. 58(1) of the regulations had gone far beyond this. Section 58(1) gave total power to the provincial minister with respect to inland fisheries — it was nothing less¹⁰⁸ “than a total divesting and abdication of jurisdiction by federal authorities over inland fisheries.”

The Canada–Nova Scotia Agreement represents a different approach. It will be recalled that implementation of that agreement calls for the enactment of mirror legislation by Nova Scotia based on the *Canada Oil and Gas Act* and the *Oil and Gas Production and Conservation Act*. It follows that were the legal issues of ownership and jurisdiction of the Nova Scotia offshore ever to be judicially determined, either the provincial or the federal legislation would be ultra vires. They could not both be valid. But, under the scheme of regulation established by the agreement, the ultimate validity of either piece of legislation makes little difference. Until the issue is resolved, the Canada–Nova Scotia Board will derive its authority from both pieces of legislation by a series of federal and provincial delegations of power. The effect of striking down one act will therefore not be significant, for the actions of the board will continue to be valid under the other act as part of a mechanism of administrative delegation. The board’s survival despite any judicial questioning of legal validity is undoubtedly assured by s. 1 of the agreement, which provides that the settlement is intended to survive any decision of a court with respect to ownership and jurisdiction. As such, the Canada–Nova Scotia Agreement represents an excellent technique for dealing with legal and jurisdictional uncertainty.

CONCLUSIONS

In this section we have briefly described the range of federal-provincial agreements which are used in the natural resources law field. Many of these agreements could pose some minor constitutional difficulties such as problems of interdelegation, but few attempt to balance constitutional powers and allocate rights in the same manner as the pricing agreements or the Nova Scotia Agreement. These two agreements have been instrumental in resolving major intergovernmental disputes which, in at least one case, reached crisis proportions. Other agreements serve a less obvious constitutional function, but one that may be equally important for resolving the recurrent administrative and fiscal problems inherent in a federal state.

The widespread use of intergovernmental agreements ought to lead us to ask and attempt to answer some important questions about their legal effect and validity. For example, in what circumstances are agreements legally enforceable?¹⁰⁹ Should disputes be referred to the Federal Court

on the application of either party¹¹⁰ or only by mutual consent?¹¹¹ What body of law should a court apply?¹¹² Should an intergovernmental agreement be subject to the same rules of interpretation as a private contract?¹¹³ In what circumstances should third parties be able to claim rights under intergovernmental agreements? May third parties be bound by the terms of intergovernmental agreements?¹¹⁴

Unfortunately, there are very few easy answers to these questions. All that can be suggested is that we should attempt to provide answers if we intend to continue to make extensive use of these agreements. For disputes are sure to arise, whether they relate to price escalation clauses in the Alberta Agreement¹¹⁵ or the passage of mineral rights with surface rights transferred as part of an irrigation project.¹¹⁶

Vacating the Field and Unexercised Federal Power

In this section we shall consider two other techniques that may be used to affect, in practical terms, the balance of power between federal and provincial governments. First, we shall discuss the effect of the failure to exercise legislative jurisdiction by the federal government. Second, we shall consider a number of possibilities for the exercise of jurisdiction, of which the federal government has failed to take full advantage, such as in the field of export control and environmental assessment. Neither technique changes the legal position of the parties, but the practice of exercising or failing to exercise jurisdiction may be of profound practical significance. Much may be achieved in some circumstances by simply threatening to exercise a hitherto unexercised jurisdiction.

AN OPEN OR VACANT FIELD¹¹⁷

If legislation has a double aspect and may be valid under either s. 91 or s. 92, then in the event of a clear conflict or inconsistency between federal and provincial statutes, the federal legislation will prevail under the doctrine of federal paramountcy.¹¹⁸ In the absence of any inconsistency, however, where the federal government has failed to occupy the field, "unexercised federal authority may give leeway to the exercise of provincial authority. . . ."¹¹⁹

In the fields of energy and resources law it is difficult to imagine or recall examples in which the field has been left vacant for valid provincial or federal legislation. One important example, however, that of interprovincial power lines, has reached the courts in recent years in *Fulton et al. v. Energy Resources Conservation Board and Calgary Power Ltd.* The same issue has also been raised by the question of access to markets for Churchill Falls power generated in Labrador, a subject on which the federal government has recently legislated. The case, and subsequent legislative action, deserves analysis for two reasons. First, the *Fulton*

case illustrates the practical importance of provincial legislation in a federal vacuum. Second, unexercised federal jurisdiction may have an important effect on the bargaining powers of the different provinces and private parties.

In *Fulton*, Alberta farmers questioned the jurisdiction of the provincial Energy Resources Conservation Board (ERCB) to authorize the construction and operation of electrical transmission lines intended to interconnect or tie-in with electrical facilities operated in British Columbia. Calgary Power Ltd. had applied to the ERCB to construct and operate an electrical transmission line from a point near Calgary to a point on the Alberta-British Columbia border. There the line would be interconnected with a similar facility built by British Columbia Hydro and Power Authority. The lines were to be separately constructed and each company was to retain control of, and responsibility for, its portion of the lines and would retain the right to connect or disconnect the rest of its system.

At the time the case was heard it was conceded that there was no existing federal regulatory authority although it was also conceded that Parliament could regulate the interprovincial interconnection if it so chose. Hence, "unless there is jurisdiction in the [ERCB] to entertain and act upon the application, the necessary expropriation of land to enable the project to proceed could not be realized" (*Fulton, supra*, at p. 582). The Supreme Court of Canada, per Laskin C.J.C., held that in the absence of any intent on the part of the ERCB to regulate either the interconnection or B.C. Hydro, the Alberta Legislature was competent to empower a board to entertain applications for the construction of intraprovincial facilities and also to empower an applicant to interconnect its local facilities with those of an adjoining province. The basis of the jurisdiction was provincial authority in relation to local works and undertakings. The matter was not taken out of provincial jurisdiction simply because Calgary Power and B.C. Hydro intended to effect an interprovincial interconnection. A different result might have been achieved if there was a single promoter who was in a position to effect its own interprovincial connection.¹²⁰

In this case, had the court not found that there was provincial jurisdiction, there would have been a regulatory lacuna. Consequently, it was hardly surprising that the intervening Attorney-General of Canada chose to support the jurisdiction of the ERCB to regulate the construction and operation of the transmission line but not the interconnection.

The federal government moved to improve its position with respect to interprovincial electricity transmission lines in an amendment¹²¹ to the *National Energy Board Act* that was introduced as part of the "energy security package" in summer 1981. The amendment, which came into force on February 1, 1983, added s. 90.1 to the act as follows:

Extension to Interprovincial Power Facilities

90.1 Extension by order. — The Governor in Council may by order designate any facility that is to be constructed and operated for the purpose of transmitting power from a place in a province to a place in Canada outside that province as a facility to which the provisions of sections 20, 40 to 45, subsection 46(1) and sections 47 to 49 shall apply and, where any such designation is made, those provisions shall apply in respect of the designated facility and the expression “international power line” wherever it appears in any of those provisions shall in each case be read as including a reference to the designated facility.

It is notable that the provision is permissively phrased — that is, it leaves regulation of construction and operation of transmission facilities to the respective provinces until a proclamation is made under the section. Federal paramountcy would be relied upon only as a last resort. The amendment was apparently introduced at the specific request of Calgary Power¹²² and had little practical effect on another dispute — that between Quebec and Newfoundland over the marketing of Churchill Falls power. It will be recalled that in the early 1960s the respective hydro corporations of those two provinces entered into a long-term contract for the sale of Churchill Falls power. Newfoundland was later to consider the contract to be inequitable because it permitted Hydro Quebec to take the major benefit of high priced exports to the United States. It is certainly the case that the *National Energy Board Act*, once extended by order under s. 90.1, would permit the expropriation of a corridor of land for future transmission lines from Churchill Falls through Quebec, but it would not permit the use of existing facilities. In other words, Newfoundland would not be able to wheel its power through the Hydro Quebec system, and in the opinion of at least some commentators, the building of a new system would not be economically justifiable.

Consequently, it is clear that the federal government has still left part of the field unoccupied, and deliberately so. There seems little doubt that the federal government could exercise its legislative jurisdiction over existing facilities as well and effectively require transmission corporations operating “interprovincial” facilities to act as common carriers. The federal government has already taken this jurisdiction with respect to oil and gas pipelines under s. 59 of the *National Energy Board Act* and there is no constitutional reason why it could not do so in relation to interprovincial power utilities. The reticence of the federal government to legislate in this area indicates unwillingness to become directly involved in the current Newfoundland-Quebec dispute, which it would prefer to see resolved by negotiation between the parties.¹²³ The federal government also takes the view that to compel Hydro Quebec to wheel Churchill Falls power would be unwise because it would be an unwarranted interference with Hydro Quebec’s management of its own business (id., at 29:19). This reasoning seems a little thin in the light of a

dispute that clearly raises the question of the national economic interest and free passage of goods and resources through provinces.

UNEXERCISED FEDERAL POWER

There may be cases in which the federal government has enacted valid legislation thereby occupying the field (if this is an issue), but has failed to apply actively its legislation. The federal government might, for example, have exercised its discretion and simply chosen not to regulate a particular activity. A failure to apply legislation does not of course connote any constitutional incapacity — quite the contrary. Nevertheless, the impact of such reticence may be quite profound, while activism or a threat of activism in a particular area may place the federal government in a strong bargaining position vis-à-vis a province. On the other hand, any exercise of legislation in an area that had traditionally been left unregulated by the federal government may be politically unpopular and attacked as an invasion of provincial rights.

Two examples may be given of federal powers or programs that might be exercised far more actively than they have been to date in the energy and natural resources field. They are the federal jurisdiction and legislation over exports and implementation of federal policy with respect to its Environmental Assessment and Review Process (EARP). We shall consider the federal export authority in the context of mining and the EARP policy in the context of major non-renewable resource projects. The active application of federal regulation in either of these areas would not necessarily lead to any direct conflict. Rather, what is envisaged is simply an extra layer of regulation that might be used to obtain greater federal control over a project.

Mining and Export Controls

Under ss. 122 and 91(2) of the *Constitution Act, 1867*, the federal government has undoubted jurisdiction with respect to the regulation of exports and natural resources. The Canadian mineral industry has always been dependent on foreign markets and exports but the level of domestic processing has been a consistent concern to both tiers of government. Nevertheless, the export of many minerals from the provinces is unregulated. In part, this reflects an acceptance of the international nature of the industry and the level of vertical integration. But, apart from questions as to the desirability of more federal regulation in this area, it would certainly be constitutionally justifiable, and there might be occasion to exercise it with respect to particular mineral deposits.¹²⁴

Federal Environmental Assessment and Review Process

According to Professor Gibson, in an article published in 1973,¹²⁵ there are many potential bases for the exercise of both federal and provincial

jurisdiction in the area of environmental management. With respect to the federal jurisdiction over the environmental assessment and review, the options are more limited. *Prima facie*, the assessment of the environmental and social impacts of a major project located within a province will be matters of provincial jurisdiction under s. 92(5) (if it occurs on public lands) or under ss. 92(13) or (16). However, any major natural resources project is likely to engage one or more aspects of federal jurisdiction in its production and development phases.

For example, any major coal project is likely to encounter many elements of federal jurisdiction. It is likely that the mining operations will have some potential effect on water quality and possibly fisheries resources. Consequently, federal jurisdiction under s. 91(12) (Sea Coast and Inland Fisheries) would be engaged.¹²⁶ The project may well involve the expenditure of federal funds, and even, to take the North East Coal project in British Columbia as an example, involve the construction of a new port or the reconstruction of an existing facility.

To what extent would these elements of federal jurisdiction justify the invocation of the federal Environmental Assessment and Review Process (EARP)?¹²⁷ The answer is not at all clear, but it probably depends upon the degree of federal involvement. Difficult questions might also arise as to the extent of such a federal review. For example, would federal involvement in an associated port development justify assessment of the whole coal project for which the port was being built in order to determine its overall acceptability?

In practice these questions do not seem to have arisen, partly due to the narrow scope of the federal EARP but also due to a perception that in some cases at least, a federal assessment would simply duplicate provincial assessment procedures. In the offshore, a positive precedent appears to have been set in the Canada–Nova Scotia Agreement by the provision that the parties will conduct joint assessment procedures that meet the requirements of both jurisdictions. A similar agreement has been reached between the federal government and British Columbia with respect to a joint assessment of offshore issues prior to the lifting of the federal-provincial moratorium on offshore exploration on that coast.¹²⁸ This type of cooperative approach is to be welcomed in areas in which both governments have legitimate jurisdictional claims, since it prevents overlap and needless duplication. In many instances, however, federal involvement would not be significant enough to warrant federal participation in the review process.

Exercise of Proprietary Rights

As has been noted earlier, provincial powers over natural resources are derived not only from the legislative responsibility as allocated in s. 92 of the *Constitution Act, 1867* — and particularly in ss. 92(5), 92(13), and

92(16) — but also, quite independently, from the proprietary rights that arise out of s. 109. In exercising these proprietary rights a province may be able to accomplish objectives that might otherwise be unattainable given the structure of ss. 91 and 92.

It has long been recognized that in disposing of its resources a provincial government may attach conditions that, if framed as legislated measures of general applicability, would be open to question as falling within federal responsibility. Thus, in the well-known case *Smylie v. The Queen* ((1900), 27 O.A.R. 172), a regulation under Ontario's *Crown Timber Act* required that any timber licence issued for Crown lands should contain a condition that any pine timber harvested under the licence must be manufactured into sawn lumber in Canada. The condition was challenged as ultra vires the province, and specifically for infringing on federal responsibility for trade and commerce under s. 91(2). Oddly though, little attention was focussed on s. 109, possibly because the legislative authority of the province was in question.

The Ontario Court of Appeal had little trouble in finding the provision intra vires the province as a measure falling primarily under s. 92(5). Although the separate judgments given vary somewhat, the court stressed very clearly that the province should be able to deal with its land in the same manner as any other landowner.

Similarly in the later *Brooks-Bidlake* case ([1923] A.C. 450), timber licences issued by the British Columbia government were required to include a condition prohibiting employment of Japanese or Chinese labourers. Licences were renewable as of right providing there had been no violation of the conditions. In an action by a timber company that had been denied a licence renewal because it had violated the condition relating to Japanese and Chinese employment, the Privy Council concluded that insofar as the stipulation involved a function assigned to the province under s. 92(5) and s. 109, it was not void and its breach constituted a proper ground for refusal to renew the licence. This was true even though the provincial order-in-council requiring the insertion of the stipulation was, in a separate reference, found to be invalid.¹²⁹ Had the stipulation, however, been directed toward private lands as well as Crown lands, it almost certainly would have been struck down as infringing on federal powers with respect to naturalization and aliens under s. 91(25).¹³⁰

Prima facie, then, the fact of provincial ownership over a wide range of natural resources would seem to open to the province a wide range of possibilities for influencing the nature of resource development, possibilities that would in some cases be otherwise closed to them under the division of powers in the *Constitution Act, 1867*. Unfortunately, this initial impression is subject to a number of important qualifications which cloud the picture considerably.

First, and most importantly, the courts in both the *Smylie* and *Brooks-*

Bidlake cases did not distinguish between those powers that may arise out of s. 92(5) and those that may arise out of s. 109. The Privy Council in *Brooks-Bidlake*, for example, merely cites the province as having been assigned functions under both of these headings. And in *Smylie*, since statutory validity was in question, the court naturally stressed s. 92(5) as the source for the legislative power to enact the impugned provision. This failure of the courts to clearly demarcate the powers that arise out of the respective sections leaves unopened some difficult questions — and questions of potential significance.

While s. 92(5) is clearly the source of legislative authority for dealing with Crown lands, what is the significance of s. 109, which vests these lands (together with minerals and royalties) in the provinces? Arguably, it is from s. 109 that a province derives its power to deal with its land qua owner rather than qua legislator. Thus, for example, in inserting in a licence or lease a condition or term that is not required by statute (or regulation), the Crown is exercising its prerogative right to dispose of its lands as it sees fit, this right arising out of its ownership under s. 109, rather than its legislative competence under s. 92(5).

What practical importance does this distinction have? Normally the conditions under which public lands may be disposed of will be specified by statute. To this extent it may matter little whether a court focusses on s. 92(5) alone, or in conjunction with s. 109. The provision will be invalid if it is found to infringe on a federal head of power under s. 91, regardless of whether there is in fact any existing federal legislation in the area (or, where both levels of government may point to a basis for legislative authority, if there is conflicting federal legislation).

But in fact there exist now, in instruments disposing of provincial resources, certain non-legislated conditions which would arguably infringe on federal authority if they were cast in legislated form. Thus, for example, in Alberta the standard Coniferous Timber Quota Certificate, authorizing the harvest of timber on Crown lands, includes as a condition:

2. The timber cut under authority of this quota certificate shall be manufactured at a sawmill located within 35 kilometres of the Town of _____, Alberta.

Similarly the standard Crown Petroleum and Natural Gas Lease in Alberta includes as a provision:

2. The lessee agrees, and it is an express condition upon which this Lease is granted, that natural gas produced from the location shall be used within Alberta, unless the consent of the Lieutenant Governor in Council to its use elsewhere is previously obtained.

Neither of these provisions is included pursuant to any legislative direction. It would seem then that the authority for their inclusion comes from the Crown's proprietary rights over its own resources.

It might of course be argued that, in light of *Smylie*, even if these conditions had been included pursuant to a statutory directive, they would have been held valid as falling under s. 92(5). But this may not always be so — as we have seen in the *Brooks-Bidlake* case, where the inclusion of a particular stipulation was held effective, although the order-in-council that directed its inclusion was held ultra vires. If in fact this distinction is correct — if provinces can accomplish through their proprietary rights flowing from s. 109 what they could not accomplish through their legislative jurisdiction under s. 92(5) — then this constitutes a departure from the sometimes stated proposition that the division of executive powers in Canada follows the division of legislative powers.¹³¹

In fact there seems some merit in giving the provinces greater latitude to act in an executive capacity with respect to public resource disposition than they may enjoy as legislators. The central question must surely be: why should a provincial Crown be restricted in its capacity to manage its resources over and above any private landowner? Thus, in *Brooks-Bidlake*, while the legislative act of requiring the insertion in a licence of a condition relating to a federal head of power may have been objectionable (and was later held ultra vires), the executive act of including the condition in the disposition of resource rights was arguably unobjectionable — as in fact it would have been unobjectionable for any private landowner disposing of his resources.

The result is attractive in another respect. It both provides a means whereby provinces can maximize the benefits from resource development and yet allows the federal government to act if these provisions are implemented in such a way as to impinge on national priorities. This follows since the provincial Crown, as with other private landowners, will be subject to valid regulatory measures by the federal government which may affect resource disposition. So, for example, it was arguably open to the federal government in the *Brooks-Bidlake* case to validly bar discrimination against aliens generally pursuant to s. 91(25), in which case the provincial Crown could not have relied on the stipulation objected to.¹³²

It also follows from our discussion that what the provincial Crown can do as a resource owner may be forbidden it as legislator. Thus, one might seriously question the constitutional validity of certain aspects of Alberta's *Gas Resources Preservation Act*, R.S.A. 1980, c. G-3, which has required since 1956 that anyone removing gas from the province (whether from Crown or private leases) must first obtain a permit from the province's Energy Resources Conservation Board. It is possible of course that this legislation might be characterized as a conservation measure within provincial competence under s. 92A of the *Constitution Act*. But one also could argue strongly that it is essentially legislation regulating exports, not only interprovincially (and thus possibly accept-

able under s. 92A), but also internationally, and is therefore ultra vires the province.¹³³

Public Corporations

The use of public corporations — usually Crown corporations — by government has been a significant feature of Canada's history. Such corporations have been used by both federal and provincial governments of all political stripes to achieve a wide range of objectives. Crown corporations in Canada have been employed in many sectors, but especially in transportation, telecommunications, and natural resources. Beginning with the growth of Ontario Hydro early in this century, the Crown corporation has been a key instrument in the development by provinces of their resources. In the postwar period it has also been used by the federal government where it saw aspects of natural resource development as having national dimensions.

As indicated, the motives for establishing Crown corporations are many, and have not always been clear. In some cases such corporations seem to have achieved their mandate almost by accident. Our interest here, however, is not in the full spectrum of uses to which such corporations can be put, nor is it in a catalogue of their alleged advantages and disadvantages. Rather, we address the much more narrow question of the role of the Crown corporation in buffering the constitutional rigidities imposed on the federal and provincial levels of government. That is, to what extent have Crown corporations dealing with natural resources been used to achieve goals that might otherwise be unattainable because of the constitutional division of powers in Canada?

Of necessity our discussion must be highly selective. An adequate case analysis of even one public resource corporation is beyond the scope of this paper; fortunately, a substantial literature on such corporations is available.¹³⁴ However, there is a relatively small amount of work published on the legal aspects of Crown corporations, and especially on the constitutional issues they raise.

One must distinguish initially between the situation where a province employs a Crown corporation to develop natural resources that are already vested in the Crown and the situation where a Crown corporation is created as part of a broader scheme both to acquire those resources from the private sector and to develop them once acquired. In the former case, the Crown can rely not only on its legislative jurisdiction in s. 92(5) of the *Constitution Act, 1867*; it is also acting in pursuance of its proprietary rights arising out of s. 109. We have discussed the significance of this distinction above. By acting as a proprietor, the province may be able to accomplish objectives that are not within its competence as a legislator.

But what of the situation where a province acquires (or more typically

re-acquires) natural resources as part of a scheme to have them developed by a Crown corporation? This in fact has been the case for the most visible incursions by provinces into direct participation in natural resource development over the past decade. Three examples stand out: potash in Saskatchewan, asbestos in Quebec, and water rights in Newfoundland. In each case the respective provincial government asserted the need for a strong provincial Crown corporation in the face of extra-provincial control over the resource and of a perceived belief that the province was not receiving adequate benefits from the existing regime.

The problems in each case arose not primarily out of the role of the Crown corporation per se, but rather out of the very institution of such schemes in the face of private sector opposition. Constitutionally, then, the major difficulties have not related directly to s. 109 and the proprietary rights that accrue to the province after the taking, but rather have arisen out of the authority in s. 92, as qualified by s. 91, as to the nature of the taking. More particularly, how is the undoubted right of the province to expropriate in s. 92(13) qualified by the federal government's authority over trade and commerce in s. 91(2)? The answer is crucial since in all three cases cited, the resource sector in question had a heavy export orientation. Indeed this will be true of most Canadian resource sectors, with the possible exception of electric power — and even in that sector there is a significant export component in certain regions.

The very ability of a province to expropriate the resource holdings of federally incorporated companies was put into question by British Columbia's attempt to nationalize the British Columbia Electric Company. The company had been incorporated under federal law, but was 100 percent owned by the British Columbia Power Corporation Limited. In that case, the attempted nationalization was declared ultra vires by the Supreme Court of British Columbia¹³⁵ on the grounds that the impugned legislation impaired the status of a federally incorporated company and was legislation relating to federally incorporated companies. The case was heavily criticized at the time but led directly to negotiations whereby the provincial government successfully purchased the shares for a negotiated price; as a result, the decision was not appealed.

However, the reasoning of Lett J. in the *British Columbia Power* case was decisively rejected, both by the Quebec Court of Appeal in *Société Asbestos Ltée. v. Société nationale de l'amiante et al.*, [1981] C.A. 43, 128 D.L.R. (3d) 405, and more recently by the Supreme Court of Canada in *Churchill Falls (Labrador) Corp. et al. v. Attorney-General Newfoundland et al.* (1984), 8 D.L.R. (4th) 1. In the latter case, a Newfoundland statute, *The Upper Churchill Water Rights Reversion Act*, would have deprived the federally incorporated CFL Company of water rights essential to its business of generating electricity. Nevertheless, McIntyre J., writing for a unanimous court, held the statute could not be impugned on the basis

of impairing the status of a federally incorporated business (at pp. 24–25 D.L.R.):

The authorities make it clear that it is not competent for a provincial legislature to legislate to impair or destroy the essential status and capacities of a federal company. However, a federal company carrying on business within a province is subject to all laws of general application in the province and as well is subject to all laws of particular application to the business, trade, or function with which the federal company is concerned, and the federal company does not acquire any favoured position in relation to other companies or to natural persons or obtain any peculiar advantages by reason only of its federal incorporation. . . . In exercising its legislative powers, however, the provincial legislature may not venture into the field of company law in respect of the federal company. It may not legislate so as to affect the corporate structure of the federal entity or so as to render the federal company incapable of creating its corporate being and exercising its essential corporate powers as a company. . . .

The Reversion Act on its face does nothing more than expropriate for all practical purposes all of the assets of CFLCo and make certain provisions regarding compensation to shareholders and creditors but no compensation to the Company. While the result of the Act would be to deprive CFLCo of the business it formerly conducted, in my view it cannot be said that the corporate being of CFLCo would be affected. It would still be a corporation in being and its essential structure would remain unchanged.

While the *Churchill Falls* case affords relatively wide latitude for provinces to expropriate natural resource rights within the province in order to put them directly under public control, the case also indicates that significant limitations remain. Even if such legislation is not objectionable by reason of its sterilizing of federally incorporated companies, it may be open to objection on other grounds. Thus, in the Quebec asbestos nationalization, it was argued that the nationalization of the company's assets was "colourable" as legislation directed at the regulation of extra-provincial trade in asbestos fibre. However, the Court rejected the notion that this could be inferred merely from the fact that the Crown corporation would necessarily be export-oriented or from the likelihood that, given its size, it would be a "price leader" in the world.

It is possible to conceive a somewhat stronger argument in the case of the Saskatchewan potash takeovers, had the government been forced to expropriate and had the legislation actually been challenged in court. The creation of The Potash Corporation of Saskatchewan by the Saskatchewan government came about as the reaction to a number of events, but perhaps most significantly because of the government's inability to obtain from the private sector certain financial information which it deemed necessary to evaluate the adequacy of its return on the resource, and because of the ultimately successful constitutional challenge to the province's Potash Conservation Regulations (*Central*

Canada Potash, [1978] 6 W.W.R. 400 (S.C.C.)) instituted inter alia as a measure to proration the potash production that would be allowed from each potash mine in the province. Presumably an argument might have been made, especially given the recent tendency of the Supreme Court to admit extrinsic evidence to establish the context in which the legislation was passed, that the legislative scheme to acquire potash mines for the province was colourable as an attempt to do what it could not do through the Potash Conservation Regulations, that is, to regulate extra-provincial trade.

The willingness of courts to examine colourability of provincial legislation in this area is evidenced by the recent Supreme Court of Canada decision in the *Churchill Falls* case, discussed above. There, although the Court rejected the argument that the expropriating legislation was invalid as an attempt to sterilize a federally incorporated company, it nevertheless held that the *Reversion Act* was ultra vires as a colourable attempt to interfere with extra-provincial rights, specifically the right of Hydro Quebec to receive power under a contract with the CFL Company. Under the Newfoundland legislation that right would have been destroyed. Key to this decision is the finding that the right in question is indeed an extra-provincial one. Unfortunately, on this crucial point the Court gives us only one paragraph, which seems to hang on the point that the contract provided for delivery of the power in Quebec, together with the fact that the contract itself provided that the Quebec courts would have power to adjudicate disputes arising from it.

Apart from the constitutional limitations placed upon provinces in expropriating property for the purposes of setting up Crown corporations, some important questions still remain as to the status of such corporations for certain purposes, and most importantly for purposes of taxation. Since most resource-oriented corporations will be specifically designated as agents of the Crown, the ambiguity that attaches to certain boards and commissions in this respect is at least not a problem. But to what extent are such corporations "the Crown"? Most importantly, are they entitled to the Crown immunity from taxation that follows from s. 125 of the *Constitution Act, 1867*? This itself raises at least two subsidiary questions. First, are they subject to federal taxation that is incidental to a valid regulatory scheme but which is not directed per se at raising revenue? Second, are they liable to federal taxation that is designed as a measure for raising revenue?

The answer to the first question is relatively simple: the provincial Crown, including of course any Crown corporation, is subject to such measures, on the basis of the *Johnny Walker* case.¹³⁶ Much more difficult, however, is the question of when a particular federal statute is directed at valid regulation of some matter under s. 91 and when it is directed at raising revenue. Obviously, there are few federal taxation statutes that cannot in some sense be regarded as regulatory. The recent

*Gas Export Tax Reference*¹³⁷ to some extent addressed this question, but both the Alberta Court of Appeal and a majority in the Supreme Court of Canada found the tax in question there — the natural gas and gas liquids tax — to be clearly designed as a revenue-raising device falling under s. 91(3), and thus prohibited by s. 125 from applying to provincial lands or property. The courts also rejected the argument that because the tax in form was applied to persons, it should not be considered in substance a tax on property.

The *Gas Export Tax Reference* is useful in another aspect; it is a rare example where the courts have been presented with the argument that the provincial Crown may be subject in certain circumstances to federal taxation — even measures that are directed purely toward revenue-sharing. This touches on the second question raised earlier: whether Crown corporations may be subject to taxes that are levied under the authority of s. 92(3).¹³⁸

The Alberta Court of Appeal dealt with this subject at some length in its judgment. The proposition advanced by the federal government in that case can be summarized briefly as follows (122 D.L.R. (3d) 48, at pp. 64–65):

It is . . . argued for Canada that, assuming s. 125 of the *British North America Act, 1867* might otherwise apply to this tax, Alberta cannot claim the immunity there provided because it has on this occasion made its property the subject of an ordinary commercial venture. As earlier noted, counsel for the Attorney-General of Canada concedes that the natural gas *in situ* is immune from federal taxation. But, it is argued, once the Province “applies industry” to the gas in the way a commercial entrepreneur would do, the immunity is lost. Moreover, it is said that this contamination is so complete that it is not merely the value added by that activity that is taxable. Rather the whole of the property lies open to federal taxation.

The argument and its application to provincial property may be illustrated by a simple example. Section 125 protects provincial forest lands and the trees on them from federal taxation. If a licence is given to a logger to remove the tree in return for the payment of a royalty, the royalty is also immune from taxation, being the proceeds of the sale of the tree *in situ*. But, it is said, if the Province chooses to retain title to the tree and hires a logger to go onto the lands to harvest the tree, remove it, and sell it on behalf of the Province, then the Province has become a commercial operator and has lost, totally, the immunity provided by s. 125.

The federal arguments in support of this proposition were essentially twofold: first, that direct provincial participation in industry was not contemplated at the time of Confederation, and second, that taken to an extreme, widespread provincial nationalization could effectively destroy the tax base of the federal government. Both these arguments were rejected by the Court of Appeal, the first as representing an interpretation out of step with “the tradition of progressive interpreta-

tion of the [*Constitution Act, 1867*]" (id., at p. 66), and the second as positing a hypothetical situation which the courts could deal with as it arose.

In any case, the court concluded, the activity being taxed did not extend beyond primary production. The majority in the Supreme Court of Canada reached the same conclusion, but its position on the ability of the federal government to tax the Crown were it in fact to be engaged in activity beyond primary production, is less clear. On the one hand, there are statements that indicate the protection afforded by s. 125 may be quite broad (136 D.L.R. (3d) 385, at p. 445):

[The federal position] therefore amounts to thi s. So long as the gas remains in the ground it is free of tax but as soon as the Crown seeks to realize on the asset in the public interest, the federal Parliament may tax at will the proceeds of the disposition of the resource. We do not think s. 125 is to be so interpreted, nor the protection of the section so readily lost.

Counsel for the Attorney-General of Canada cited United States authorities concerning the taxation by the United States federal government of certain "undertakings" by state governments (*New York et al. v. United States* (1945), 326 U.S. 572). The exemption of the state from federal taxation in that country comes not as a result of an express constitutional provision analogous to s. 125 but rather was brought about by judicial decision interpreting constitutional relations at large. These decisions are, of course, wholly inapplicable here and simply serve to show how much stronger is the provincial position in the constitutional issues before us founded, as the provincial exemption is, upon an express constitutional provision, s. 125.

Yet immediately following this passage the Court stresses the relatively unprocessed state of the gas being sold by the province and the fact that the province could not be said to be in the "business" of gas processing (id., at pp. 445–46). Similarly, toward the end of the judgment, we are left with this somewhat ambiguous conclusion (id., at p. 446):

We are not concerned with the taxation or regulation of the provision of a service by a province or with the conduct by a province of business which incidentally concerns the consumption of a resource property. Considerations which might concern a court in any or all of these other matters are of no application in the application of s. 125 to legislation in the form of the proposed [legislation].

It would seem then that there may be some activities of the Crown that might not be afforded the protection of s. 125.

As a footnote to this case, a similar objection to the validity of the same tax was raised by Saskatchewan with respect to the tax liability of the Saskatchewan Oil and Gas Corporation (SASKOIL), and by British Columbia in the context of the British Columbia Petroleum Corporation (BCPC). However, after the decision of the Alberta Court of Appeal, but before the decision of the Supreme Court of Canada on the *Gas Export*

Tax Reference, Saskatchewan, while denying liability for the tax, and the Government of Canada, while claiming the right to impose the tax on the provincial Crown, agreed that the federal government would remit the tax so far as it applied to the Crown, while Saskatchewan would pay grants to the federal government equivalent to the amount that would have been owing had the Crown been liable.¹³⁹ An equivalent arrangement was reached with British Columbia.¹⁴⁰

The discussion above has focussed on the role of provincial Crown corporations. In fact, the federal government has also made significant use of Crown corporations to achieve a number of goals. This is especially true with respect to federal involvement in natural resources. In uranium, for example, Atomic Energy of Canada Ltd. occupies a central role in Canada's nuclear industry.¹⁴¹ And more recently, Petro-Canada has served as a primary instrument for the realization of a national energy policy.

Conceptually, the existence of federal Crown corporations raises problems similar to those discussed in the context of provincial enterprises. However, while of at least equal interest as policy studies, such corporations raise less interesting questions with respect to constitutional law. This is partly because such corporations are not open to legal challenge merely because they affect interprovincial or international trade, an area obviously within federal competence under s. 91(2). Partly too, some potentially interesting issues have been defused by reaching an accommodation with the provinces. In the uranium industry, for example, this has been accomplished by leaving wide regulatory powers to the provinces in certain areas. With respect to Petro-Canada, the potentially contentious issue of the corporation's obligation to comply with provincial resource conservation legislation is rendered largely moot, since the enabling legislation specifically binds the corporation to comply with the laws of the province related to resource conservation and any laws that apply generally to corporations engaged in a business similar to that of Petro-Canada.¹⁴²

Commissions of Inquiry

Royal commissions and other commissions of inquiry represent a less obvious way in which both levels of government in Canada have used their executive powers to address matters which might otherwise have been considered as beyond their legislative responsibility. Of course, the power to commission an inquiry brings with it no accompanying mandate to implement policy, and in this respect it may be objected that such commissions can have no direct effect on the substance of federal-provincial conflicts. Yet viewed from a broader perspective, such commissions have had significant, albeit indirect, effects on intergovernmental relations in Canada through their articulation of broad concerns and their influence on the development of policy.

Royal commissions have been particularly useful in providing for a wide-ranging discussion of issues that extend in their significance across jurisdictional boundaries to involve concerns that touch on both provincial and federal areas of competence. Surprisingly, given the significant role that royal commissions have played in Canadian history, little work has been done on their impact on federal-provincial relations.¹⁴³

Even a cursory survey of federal and provincial royal commissions since Confederation is beyond the scope of this paper — there have been more than 400 commissions appointed by the federal government alone. Similarly, an inquiry into all royal commissions dealing with natural resources would be impossible here, given, for example, that there have been at least eleven different federal commissions on the subject of various aspects of the grain industry and at least thirteen devoted to coal. However, it does seem useful to select a few royal commissions — both federal and provincial — to illustrate how they have provided vehicles for each level of government to voice concerns or provide a public forum for policy comment in areas where its legislative competence might in some respects be questionable.

Royal commissions have been classified by one writer into four major categories.¹⁴⁴ First, one may think of a large number of royal commissions investigating major disasters (fires, air crashes, mine explosions, riots). Second are commissions into the cultural and social life of the province or nation (broadcasting, the arts, the status of women, bilingualism and biculturalism). Third are those commissions that focus on the performance and organization of government itself. And finally, and of interest here, are those commissions dealing with the Canadian economy, including, *inter alia*, banking, railways, and various aspects of natural resources policy.

Perhaps the clearest example of the use of a royal commission to resolve an issue touching directly on federal-provincial relations is provided by the Dysart commission (in form, two commissions on the natural resources of Saskatchewan and Alberta, respectively).¹⁴⁵ Although a federal royal commission, it was set up pursuant to a term of the Memoranda of Agreement on Natural Resources Transfer between the federal government and the provinces of Saskatchewan and Alberta. The need for the commission arose out of the stated purpose of the transfer agreements — to place each province:¹⁴⁶

. . . in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation in 1905.

To this end compensation was provided to both provinces under the terms of their respective agreements. The Dysart commission was set up pursuant to an undertaking in the agreement as the mechanism for deciding what, if any, further compensation should be afforded the

provinces. Under the agreements the commission was given wide range to set its own guidelines as to what was relevant, but even more remarkable was the direct impact its recommendations were contemplated as having on government policy. Thus, the relevant clause from the Alberta Agreement provided that the commission, when set up, would (id., s. 22):

. . . be empowered to decide what financial or other considerations are relevant to the enquiry, [shall submit a] report . . . to the Parliament of Canada and to the Legislature of Alberta; and if by the said report, the payment of any additional consideration is recommended, then, upon agreement between the Governments of Canada and the Province following the submission of such report, the said Governments will respectively introduce the legislation necessary to give effect to such agreement.

While this use of a royal commission as, in effect, a referee in federal-provincial negotiations is exceptional, it does at least illustrate the confidence that generally has been held by Canadians in the relative impartiality of such commissions. This confidence is no doubt partially due to — and has been reinforced by — the common practice of appointing senior judicial officers as commissioners. Both federal and provincial governments have been quick to appreciate on occasion the advantages of royal commissions in depoliticizing and defusing highly charged issues. In some sense a perception is generated that the issues have then been removed to a more “neutral” arena for examination.

Apart from the unique case of the Dysart commission, the federal government has from time to time, on its own initiative, undertaken inquiries into areas of natural resources that it perceives as touching in some way on national concerns. Thus there was an emphasis in the first half of this century on grain and coal, two resources that played vital roles in the national economy. Similarly, the postwar concern with energy (and especially petroleum and natural gas) was reflected in the federal Royal Commission on Energy¹⁴⁷ — the Borden commission — established in 1957 by the Diefenbaker government in response to the growth, especially into the export market, of the Western Canadian oil and gas industry.

The commission submitted two reports,¹⁴⁸ both of which had significant impacts on federal energy policy. The second proposed suggestions for a rethinking of Canada's national oil policy to ensure adequate markets to allow development of the domestic petroleum sector, including the setting of a production target of 700,000 barrels a day by the end of the 1960s. The first report, dealing primarily with the regulation of oil and gas exports, has had more permanent effects on the regulatory regime for energy in Canada. Most significant were the recommendations, accepted by the federal government, with respect to the creation and role of a National Energy Board. The establishment of this body

provided not only a vehicle for a more active federal role in oil and gas (as well as other energy sectors), but also a focus for a greater federal interest generally in energy as a national concern. In this respect the Borden commission, in both proposing and articulating a strong federal presence in the area, may be seen as sowing the seeds for the much more dramatic federal initiatives of the 1970s and 1980s.

If the federal government has employed royal commissions to address resource issues that it has perceived to be of national concern, provinces have also employed royal commissions to address matters which, while arguably within federal legislative competence, nevertheless have particular and significant local impacts. Normally, of course, provinces will have the primary jurisdiction over resource development. But even in areas of federal competence provinces may wish to have at least an indirect impact on policy development. This is nowhere more true than in the case of uranium mining.

While the primary responsibility for regulating the uranium industry rests with the federal government, individual provinces have maintained a keen interest in the industry, as much because of health and safety issues as because of its importance to provincial economies. In asserting this interest, a major vehicle for articulating and addressing regional concerns has been the provincial royal commission.

Sometimes the particular problems associated with uranium development have arisen incidentally as part of a broader inquiry. Thus, for example, Ontario's Royal Commission on the Health and Safety of Workers in Mines¹⁴⁹ — the Ham commission — quite naturally considered the special health and safety risks associated with working in uranium mines in the province. However, other provincial commissions have been set up to deal precisely with the question of uranium mining, whether generally in the province (as with British Columbia's Royal Commission on Uranium Mining — the Bates commission) or in some specific locale (as with Saskatchewan's Cluff Lake Board of Inquiry — the Bayda commission — which was asked to address both a specific project and the possible future expansion of the industry in Saskatchewan).

While the Bates commission issued only a brief interim report,¹⁵⁰ the high profile that uranium mining received as a result of the commission's proceedings must be considered a major factor in the provincial government's decision to proclaim a moratorium on uranium exploration in British Columbia. The Bayda commission, by contrast, did issue a comprehensive final report,¹⁵¹ which addressed issues not only within strict provincial jurisdiction, but also evaluated, *inter alia*, federal control arrangements with respect to uranium. Moreover, the Bayda commission dealt extensively with issues that went far beyond purely local concern, with lengthy sections on such matters as the disposal of nuclear wastes, nuclear proliferation, terrorism, and moral and ethical concerns over nuclear energy (such issues were also voiced in connection with the

Bates commission). In this respect both the Bayda and Bates commissions have been instrumental in raising as a matter of national debate, albeit in a local context, a host of difficult questions relating to nuclear energy.

Perhaps because of their lack of power to implement policy, both federal and provincial governments have been relatively relaxed not only in the scope of the terms of reference they set in establishing royal commissions themselves, but also in their reaction to inquiries established by their provincial or federal counterparts. It has been quite normal for federal departments to make formal submissions to provincial royal commissions on issues that they feel touch on matters of national interest, while provincial governments in turn regularly submit briefs to federal inquiries.

Thus, all the western provinces made submissions to the Borden commission through one or more government officials, while several federal agencies participated at the Cluff Lake inquiry, with one federal Crown corporation (Eldorado Nuclear Ltd.) maintaining the status of full-time participant. Sometimes the expertise of the other level of government will be vital to adequately addressing the issue. For example, Newfoundland's royal commission to inquire into radiation compensation and safety at the St. Lawrence fluorspar mines¹⁵² relied heavily on epidemiological studies conducted by the federal Department of Health and Welfare.

This relatively laissez-faire attitude by both levels of government has been reflected also in the approach commissions themselves have taken toward their mandate. As has been mentioned, commissions have generally not been hesitant in commenting on matters that might be seen as falling within the responsibility of the other level of government. Occasionally there may be an acknowledgment of this division of authority. The Borden commission, for example, concludes its series of recommendations with respect to the establishment of a National Energy Board with this caveat (*First Report*, at p. 53):

15. In making recommendations the Commission affirms that provincial legislation and regulation, within its proper sphere, should be respected and the recommendations in this report should not be construed as recommending or suggesting any interference with provincial jurisdiction.

However it goes on elsewhere to "suggest" that (*Second Report*, at p. 145):

. . . the appropriate authorities in each producing province should be urged to keep their policies and regulations concerning exploration and development under constant review, in order that development may proceed in as orderly a manner as possible in relation to available markets for Canadian crude.

We note finally that, at least in the federal arena, royal commissions have fallen somewhat into disfavour in recent years as a means of addressing resource issues that have both national and provincial overtones. To some extent they seem to have been replaced with intra-departmental task forces designed to address broad policy issues. One can point, for example, to the recent *Mineral Policy* (Ottawa, December 1981) discussion paper from the Department of Energy, Mines and Resources or the earlier *Energy Policy for Canada: Phase I* (Ottawa, 1973), from the same department. To some extent also, especially in the energy field, the royal commission has given way to direct negotiations between different levels of government.

While recognizing that royal commissions have limitations, and while conceding that political decisions must ultimately be made by governments, not commissions, we nevertheless question whether the energy debates of the last ten years in Canada do not suggest an instance where a royal commission would have proved highly useful. At least such a body would have provided a focus for articulating both national and provincial concerns in a less heated atmosphere. At most it might have suggested approaches for avoiding or resolving the numerous conflicts and impasses that have characterized the development of energy policy over the last decade.

The Use of Reference Cases

Reference cases have always played an important role in the development of Canadian constitutional law,¹⁵³ but over the last 20 years some of the most significant issues of natural resources management have fallen to be decided under a reference, originating with either the federal or a provincial government. Some of the matters referred have raised extremely broad and controversial questions that have had a high public profile. For example, the four recent offshore cases, (*1967 Offshore Reference*,¹⁵⁴ *Georgia Strait Reference*,¹⁵⁵ and the two Newfoundland references¹⁵⁶) all originated as references. Similarly, the Alberta government chose to question one element of the National Energy Program through the *Gas Export Tax Reference*,¹⁵⁷ while the Newfoundland government referred its Churchill Falls legislation to the courts prior to proclamation.¹⁵⁸ Finally, although in a different field, the tactical use of the reference by provincial governments in the three patriation cases is nothing short of remarkable.¹⁵⁹

In this section of the paper, we shall consider four issues: the validity of references; the framing of reference questions; the willingness of the courts to answer the questions posed; and, by way of conclusion, the effect and utility of references in this area of constitutional law. So far as possible the analysis will be confined to references in the resources and energy law fields.

THE VALIDITY OF REFERENCES

There can be no doubt of the validity of federal or provincial legislation which provides that the governor-general-in-council or the lieutenant-governor-in-council may pose abstract questions for the opinion of the Supreme Court of Canada or a provincial Court of Appeal, respectively. The consent of the other level of government is not required for a reference, even though a court's answer may effectively curtail its legislative powers.¹⁶⁰ This question was settled by the Privy Council in 1912 in *Attorney-General Ontario et al. v. Attorney-General Canada*, [1912] A.C. 571 (P.C.), although in that case the provinces appeared to be questioning the right of either level of government to pose reference questions,¹⁶¹ on the ground that this would be an interference with the judicial character of a court. The Privy Council recognized that there were some dangers with reference cases — dangers that the questions asked might cause “undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves” (*id.*, at p. 583). Nevertheless, it was held that this was a danger that had to be faced by the parties phrasing the questions and was not a ground for invalidating legislation which permitted reference questions to be put to the courts.

THE FRAMING OF REFERENCE QUESTIONS

The power to frame constitutional questions for judicial determination may give a significant tactical advantage to the executive that chooses to call for a reference. In some cases, the terms of the reference may be agreed upon by both federal and provincial governments, but in other cases the right to draft unilaterally the question may be important strategically, insofar as it can be used to direct the attention of the court (and by implication to remove certain factors from judicial consideration). In addition, questions can be posed at a high level of generality and abstraction, which may have the effect of de-emphasizing more pragmatic considerations.

The use of an agreed reference is illustrated by the important *Reference Re Water and Water Powers*.¹⁶² This was initiated as a result of discussions held at the 1927 Dominion and Provincial Conference. There was general agreement at the conference that the question of legislative control over, and proprietary interest in, water powers should be referred to the courts. The questions were developed in consultation with the provinces and referred directly to the Supreme Court, whereupon the Court itself suggested rearrangement of the questions.¹⁶³ Here, undoubtedly, was an attempt to resolve consensually a set of problems upon which “it was found impossible to reach any general agreement.”¹⁶⁴ A reference of this nature should lead to a clearer understand-

ing of the respective powers of the two levels of government, which might in turn facilitate future negotiations and agreements. However, in many other cases there may be insufficient common ground to permit an agreement on the terms of a reference. Resort will then be had to a unilateral reference.

The tactical use of the reference power is well illustrated by the *Gas Export Tax Reference*, the *Patriation References*, and the *Egg Marketing* case. The background to the *Egg Marketing* case¹⁶⁵ has been described by Professor Weiler,¹⁶⁶ who notes that it originated as a reference in Manitoba, the main purpose of which was to launch a collateral attack on egg and chicken marketing schemes then operating in Ontario and Quebec. Manitoba had contended that the marketing schemes of these provinces were harming its own operators, but it had been unable to persuade the federal government to initiate a federal reference. Manitoba therefore developed its own marketing scheme for the sole purpose of having the courts declare it invalid. Weiler strenuously objects to this rather devious method of proceeding — not because the matter should not have been determined, but because the issue was referred as an abstract reference with little supporting information.¹⁶⁷ This common criticism of references attacks the manner in which reference questions are posed rather than their function.¹⁶⁸

In the *Gas Export Tax Reference*, the Alberta government was successful in using the reference to strengthen its bargaining position with the federal government. Of special interest for present purposes was the unusual set of facts posed for judicial determination. As discussed earlier, the reference posited a highly artificial fact situation, one calculated to place the province in the strongest possible position. Thus, a third-party constitutional challenge on less favourable facts was avoided. Undoubtedly, the judgment of the Alberta Court of Appeal (handed down on March 20, 1981¹⁶⁹) strengthened Alberta's bargaining position in negotiations leading to the September 1981 Agreement on pricing and taxation.

The *Churchill Falls Reference* was part of a broader provincial strategy aimed at recovering control of the water rights of the Upper Churchill. Newfoundland had enacted legislation revesting the water rights in the province, unencumbered by any other interest. However, rather than proclaiming the legislation and awaiting the inevitable constitutional challenge, Newfoundland chose to refer the validity of the act to its court of appeal. In part, this strategy may have been chosen to avoid unnecessary difficulties for the financiers of the Churchill development.¹⁷⁰ In part also, it was probably intended to encourage further negotiations between Quebec Hydro and Newfoundland.¹⁷¹

The importance of the right to frame the questions is illustrated by the competing references made to the courts by the Newfoundland and federal governments over the offshore issue. The *Newfoundland Reference* drew upon the opening words of s. 109 of the *Constitution Act, 1867*

and emphasized the provincial property rights aspects of the problem.¹⁷² The *Reference* also applied to all areas lying seaward from the ordinary low-water mark and embraced both the territorial sea and continental shelf. By contrast, the *Federal Offshore Reference* was explicitly limited to the Hibernia area of the Newfoundland continental shelf, and the questions asked of the court were restricted to legislative jurisdiction and the right to explore and exploit.¹⁷³ The federal government took this tack rather than awaiting an ultimate appeal to the Supreme Court of the Newfoundland reference in order "to have the urgent and pressing questions of jurisdiction in Hibernia resolved at the earliest possible date by the highest court . . ."¹⁷⁴

The most important tactical use of the right to pose reference questions over the last decade is not from the resources area but rather the provincial patriation references. These references were initiated in three separate jurisdictions as part of a successful attempt to force the federal government to return to the negotiating table and compromise further with the eight dissenting provinces over patriation of the Constitution and the content of a Charter of Rights. Separate references were initiated to take advantage of different courts and the different constitutional positions of Newfoundland and Quebec.¹⁷⁵

JUDICIAL ANSWERS

A court has a duty to attempt to answer questions posed to it on a reference but the duty is not an absolute one.¹⁷⁶ Courts may refuse if "it is practically impossible to define a principle adequately,"¹⁷⁷ if the question is "too vaguely expressed,"¹⁷⁸ too abstractly expressed,¹⁷⁹ too speculative or premature, or ambiguous.¹⁸⁰ Hence, in the *Churchill Falls Reference*, the Newfoundland Court of Appeal refused to answer a number of the questions posed, which dealt with the consequential effect of the act rather than its constitutional validity. For the court to answer these questions might "involve consideration of debatable fact . . . which may affect the rights of persons not represented before it."¹⁸¹

The authorizing legislation for references generally permits questions to be posed "on any issue of fact or law or any matter which the Lieutenant Governor in Council thinks fit to refer."¹⁸² A court is not required to answer political questions, but it may be difficult on occasion to discern the nature of the question asked. In the patriation references the courts were asked to determine and to define the existence of a constitutional convention.¹⁸³ All the courts (with the exception of Hall J.A. in the Manitoba Court of Appeal)¹⁸⁴ agreed to answer this question, partly because of the broad phrasing of the reference legislation, but partly also because it raised a "fundamental issue of constitutionality and legitimacy."¹⁸⁵ Commentators have severely criticized the court for not refusing to answer the question.¹⁸⁶

The question of non-justiciability has not arisen in the offshore refer-

ences. The issues raised in these cases have clearly been legal questions, although undoubtedly they have been politically motivated. The same is true of the *Gas Export Tax Reference*. Nor were there suggestions in either the *Churchill Falls Reference* or the *Reference Re Water and Water Powers* that the questions were not legal ones.

THE EFFECT AND UTILITY OF REFERENCES

Strayer has noted a relative decline in the use of references in constitutional cases between 1967 and 1981.¹⁸⁷ The bare figures, however, are not suggestive of the true significance of reference cases in the resources law field. One should not overstate this position — the *Fowler*,¹⁸⁸ *Central Canada Potash*¹⁸⁹ and *CIGOL*¹⁹⁰ cases, for example, were all the result of contentious litigation — but one cannot avoid the impact that reference cases have had in this area of law.

Canadian commentators have generally been willing to concede the utility of reference cases, but with some reservations.¹⁹¹ There have been attacks (sometimes severe) on the propriety of the court answering questions in the abstract,¹⁹² or (more recently) answering “political” questions.¹⁹³

A related criticism is that undue deference has been paid to reference cases in subsequent litigation. In theory a reference is merely an advisory opinion, but in practice references tend to be followed in the same manner as decided cases, and applied to facts that may not have been in the contemplation of the court at the time.¹⁹⁴

Some constitutional aspects of natural resource issues lend themselves to resolution at a relatively high level of abstraction. The offshore references are the most important examples. Judicial consideration of offshore questions has involved the analysis of large amounts of historical material and constitutive documents relating to the colonies of Newfoundland, British Columbia and Vancouver Island, as well as the divination of international law at various “critical dates.” The questions asked of the courts have been wide and have covered legislative and proprietary rights over huge areas. These questions are probably best raised in such a broad manner rather than awaiting the incremental approach of individual litigation. However, references do not solve all the problems, even in cases of this nature. For example, questions will still arise as to whether a particular fjord or stretch of water constitutes inland waters and is therefore within the given province.¹⁹⁵ But reference cases ought to clarify the respective rights of the two levels of government, and thus pave the way to negotiated agreements on matters such as offshore resource management and the identification of waters that are internal to the province. Although some agreements (such as the Nova Scotia Agreement) may be negotiated (and are arguably best negotiated) in blissful ignorance of ultimate legal authority, if the parties

are unable to reach agreement the only answer may be a reference to clarify the legal rights of the parties.

Neither is the tactical use of references necessarily obnoxious. In the *Egg Marketing* case, the issue was essentially a problem of standing. How could Manitoba question the validity of the Ontario and Quebec legislation if the federal government was unwilling to refer the question itself? Similarly, why should Alberta not be able to use a “manufactured” reference to bolster its bargaining position, provided that the reference is confined to legal issues that are real? In many cases the reference technique may be the most effective way of obtaining a speedy clarification of the rights of respective parties. In the *Gas Export Tax Reference*, Alberta was able to question the validity of the federal tax before it had even been proclaimed. Similarly, Newfoundland was able to obtain a decision on its Churchill Falls legislation without incurring the dislocation which might have transpired from private litigation following proclamation.

Conclusions

The last decade has seen a remarkable rash of intergovernmental conflicts with respect to the management of natural resources. There have been profound disagreements not only on how resources should be managed (and especially, priced), but also the appropriate role of each level of government in determining policy. The most dramatic instances of federal-provincial conflict have obviously been in the energy field, but one could also point to federal-provincial disputes in mining (in British Columbia, Saskatchewan, and Manitoba) and fisheries.

Typically these disputes have arisen not primarily because of abrupt changes in the philosophies of either federal or provincial governments; rather, changes in the economic context of natural resources development have acted as a catalyst to expose the latent weaknesses in the Canadian constitutional structure. Thus, the lack of any mechanism to allocate provincial and federal shares of resource rents has always been a feature of our Constitution, but by and large it was a non-troublesome feature until the OPEC oil embargo of 1973.

Both because the changes following OPEC were unexpected (one need only look at the Borden commission's report on energy prospects, as perceived in the late 1950s, to realize how unexpected) and because the changes — and the necessary policy adaptation by governments to the changes — were so rapid, the inadequacies of the constitutional structure were more vividly apparent than would have been the case, for example, given a more gradual rise in energy prices. Not surprisingly, constitutions are not at their best in accommodating rapid and unforeseen shifts in the relative power of the constituent members of an economic union.

Similarly, we feel that new legal challenges in the field of natural resources will emerge over the next decade, challenges that will once again test Canada's constitutional fabric. Almost certainly, some of these challenges will arise over water management, especially in the West. Yet once again, this is an area where principles governing inter-jurisdictional responsibilities (both federal-provincial and interprovincial) are at best ill-defined, and where the structures for coping rationally with resource scarcity are primitive. To some extent this characterization could be applied to a wide range of joint environmental problems as well.

This failure in the past to anticipate, or at least to accommodate, the regulatory needs of the natural resources sector has arguably had deleterious effects on the economic union. Neither business nor government is able to plan efficiently in a climate of legal uncertainty in an entirely satisfactory way. Even abstracting from the fact that court proceedings to decide a single issue may take a few years, courts are not always the best vehicles for achieving broad understandings of the appropriate roles of the federal and provincial governments in shaping natural resources policy.

Certainly, for example, the Newfoundland offshore reference has removed much of the ambiguity with respect to the constitutional positions of Newfoundland and Canada respectively, with respect to jurisdiction over offshore oil and gas exploitation. But, by the same token, the *Churchill Falls* case, while deciding on the validity of a specific piece of provincial legislation, has left untouched many important questions with respect to ability of a province to regain control over its resources. Similarly, the Supreme Court in the *Gas Export Tax Reference* carefully avoided asserting general propositions that extended beyond the narrow and artificial fact situation confronting it, thus key questions relating to the scope of s. 125 are still unanswered.

Nor do we necessarily take issue with this attitude of restraint which the Supreme Court has adopted in dealing with constitutional aspects of natural resources management in the last ten years. Indeed, our point is precisely that general and satisfactory solutions to the problems we have raised are not typically found in legal fora. This is because many of those problems — Who should control? Who should benefit? To what degree? — are not essentially legal in nature. They are problems that arise naturally from the jurisdictional tensions inherent in any federal state; they do not arise primarily from the inadequacies or rigidities of the Constitution.

Thus we have seen that, where there is the political will to deal jointly with an issue, apparent constitutional barriers quickly melt away in the face of such techniques as delegation of appropriate authority and inter-governmental agreements. These techniques are, far more than any court-imposed solution, likely to yield a resolution that is designed to

address the substance of the problem and to balance both national and regional interests.

As Professor Lederman nearly a decade ago noted incisively with respect to natural resources revenues:¹⁹⁶

There is no constitutional prohibition against killing geese that lay golden eggs. Federal and provincial governments can be severally or collectively foolish about this . . . The federal and provincial tax collectors have to agree to some kind of sharing that leaves natural resource enterprises viable and able to produce and flourish within reason.

We think these conclusions still hold true today. The central problem in allocating federal and provincial roles with respect to the development of natural resources is not a legal one, it is political. That battle will often involve legal precepts and will sometimes be fought in legal fora, but it is still ultimately a political conflict. What we can suggest with some confidence is that given a political resolution of a particular problem in resource management, the Canadian constitutional structure very likely will prove elastic enough to accommodate it.

Appendix A

Constitution Act, 1982

PART VI

Amendment to the Constitution Act, 1867

50. The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding thereto, immediately after section 92 thereof, the following heading and section:

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

- 92A. (1) In each province, the legislature may exclusively make laws in relation to
- (a) exploration for non-renewable natural resources in the province;
 - (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
 - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
- (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
- (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.
- (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
- (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
 - (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

- (5) The expression "primary production" has the meaning assigned by the Sixth Schedule.
- (6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

51. The said Act is further amended by adding thereto the following Schedule:

THE SIXTH SCHEDULE

Primary Production from Non-Renewable Natural Resources and Forestry Resources

- 1. For the purposes of section 92A of this Act,
 - (a) production from a non-renewable natural resource is primary production therefrom if
 - (i) it is in the form in which it exists upon its recovery or severance from its natural state, or
 - (ii) it is a product resulting from processing or refining the resources, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and
 - (b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

Notes

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1. J. Ballem, "The Energy Crunch and Constitutional Reform" (1979), 57 *Can. Bar Rev.* 740 at p. 745. The wide use given the declaratory power is detailed by A. Lajoie in *Le Pouvoir Déclaratoire du Parlement* (Montreal: Les Presses de l'Université de Montréal, 1969), at pp. 123–51. It will be clear from a perusal of the list given there that by far the most predominant application of the power has been with respect to railways. However, it is not only the West that fears its possible use with respect to energy projects. In October 1974, the then premier of Quebec, Robert Bourassa stated:

Aux termes de l'Acte de l'Amérique du Nord britannique de 1867, il est clair que les provinces détiennent la propriété des ressources naturelles et, par conséquent, des ressources énergétiques ainsi que la responsabilité de leur mise en valeur et de leur exploitation sur leur territoire. À ce sujet, j'oublie pour l'instant le fait qu'en vertu de son pouvoir déclaratoire, le fédéral s'est attribué la gestion de l'uranium. Malgré son importance pour l'avenir énergétique du Canada, j'espère qu'il ne s'agirait point là d'un précédent applicable à toutes les autres sources d'énergie à partir du moment où elles deviennent essentielles et que la constitution canadienne n'est pas encore modifiée en ce qui concerne les droits des provinces sur leurs ressources.

- G. Rémillard, "Situation du partage des compétences législatives en matière de ressources naturelles au Canada" (1977), 18 *Cahiers de Droit* 471, at p. 530, citing document FP-4097 du Secrétariat canadien des conférences intergouvernementales.
2. At the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, February 5–6, 1979, Quebec submitted that the declaratory power be abolished or restrained. The list of "Best Effort" Draft Proposals (Document: 800-010/036) limited the scope of s. 92(10)(c) but the proposal did not receive unanimous consent. Provincial efforts to restrain the declaratory power date back to the Interprovincial Conference of 1887 — see K. Hanssen, "The Federal Declaratory Power Under the B.N.A. Act" (1968), 3 *Man. L.J.* 87, at p. 89.
3. P.W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977), at p. 332.
4. *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 273, 68 D.L.R. (3d) 452, 9 N.R. 541.
5. *Reference Re Proposed Federal Tax on Exported Natural Gas* (1982), 136 D.L.R. (3d) 385, [1982] 5 W.W.R. 577 (S.C.C.); affg (1981), 122 D.L.R. (3d) 48, [1981] 3 W.W.R. 308 (Alta. C.A.) (hereinafter *Gas Exports Tax Reference*).
6. *Reference Re Questions Set Out in O.C. 1079/80, Concerning Tax Proposed by Parliament of Canada on Exported Natural Gas*, [1981] 3 W.W.R. 408 (Alta. C.A.), at p. 416.
7. *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.) (hereinafter *Federal Offshore Reference*), at p. 418.
8. Hogg, *Constitutional Law of Canada*, p. 39.
9. *A.-G. Quebec v. Nipissing Central Railway Co. and A.-G. Canada*, [1926] A.C. 715, [1926] 3 D.L.R. 545, [1926] 2 W.W.R. 552 (P.C.).
10. *Reference Re Water and Water Powers*, [1929] S.C.R. 200, at p. 218. For a study that analyzes in detail the limits of both federal and provincial powers to expropriate, see

A. Lajoie, *Expropriation et Fédéralisme au Canada* (Montreal: Les Presses de l'Université de Montréal, 1972).

11. *Reference Re Ownership of Offshore Mineral Rights*, [1967] S.C.R. 792 (Hereinafter 1967 *Offshore Reference*).
12. For a general critique, see R. Harrison, "Jurisdiction Over the Canadian Offshore: A Sea of Confusion" (1979), 17 *Osgoode Hall L.J.* 469. For an extensive, and highly critical, comment of the Court's judgment at the time, see J. Brière, "La Cour suprême du Canada et les droits sous-marins" (1967-68), 9 *Cahiers de Droit* 736. For a shorter discussion that addresses the question in the context of the nature of federalism, see J.-P. Lacasse, "Fédéralisme et ressources sous-marines" (1975), 6 *Rev. Gén. de Droit* 475.
13. *Reference Re Ownership of the Bed of the Strait of Georgia and Related Areas* (1976), 1 B.C.L.R. 97 (hereinafter *Georgia Strait Reference*) (B.C.C.A.).
14. *A.-G. Canada v. A.-G. British Columbia*, [1984] 4 W.W.R. 289 (S.C.C.).
15. *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (hereinafter *Newfoundland Reference*) (Nfld. C.A.), at p. 12.
16. An exposition of the position of each province and the principles that might apply is found in J. Charney, "The Offshore Jurisdiction of the States of the United States and the Provinces of Canada — A Comparison," presented June 24, 1982 at the Sixteenth Annual Conference of the Law of the Sea Institute, "The Law of the Sea and Ocean Industry: New Opportunities and Restraints," Halifax, N.S.
17. The 1977 federal-provincial agreement is examined in R. Harrison, "The Offshore Mineral Resources Agreement in the Maritime Provinces" (1977) 4 *Dalhousie L.J.* 245.
18. Terms of Union of British Columbia and Terms of Union of Prince Edward Island, reprinted in R.S.C. 1970, Appendices at 279 and 291, respectively. *Constitution Act, 1930*, transferred natural resources to the Prairie provinces and transferred the Railway Belt and Peace River Block back to British Columbia, R.S.C. 1970, Appendices at 365.
19. *Newfoundland Act*, R.S.C. 1970, Appendices at 415 (formerly named *British North America Act, 1949*).
20. For a general review of the legal basis of such claims, see: K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*" (1973), 51 *Can. Bar Rev.* 450; B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (D. Phil. thesis, Oxford University, 1979; reprinted by The University of Saskatchewan Native Law Centre, 1979). Note also that certain provincial lands may still be subject to such claims.
21. This issue is dealt with in, inter alia, the following articles: K. Lysyk, "Unique Constitutional Position of the Canadian Indian" (1967), 45 *Can. Bar Rev.* 513; P. Hughes, "Indians and Lands Reserved for Indians Off Limits to the Provinces" (1983), 21 *Osgoode Hall L.J.* 82; D. Brown, "Indian Hunting Rights and Provincial Law, Some Recent Developments" (1981), 39 *U.T. Fac. L. Rev.* 121. For an historical account of the development of much more limited rights in Quebec, see H. Brun, "Les droits des Indiens sur le territoire du Québec" (1969), 10 *Cahiers de Droit* 415. Brun concludes that any such rights — in effect, to hunt and fish for subsistence — are not truly aboriginal rights per se.
22. M. Leitch, "The Constitutional Position of Natural Resources," in *Canadian Federalism: Myth or Reality*, 3d ed., edited by J. Peter Meekison (Toronto: Methuen, 1977), at p. 173.
23. (1982), 136 D.L.R. (3d) 385 (S.C.C.).
24. *Constitution Act, 1930*, R.S.C. 1970, Appendices at p. 365.
25. *Reference Re Proposed Federal Tax on Exported Natural Gas* (1982), 136 D.L.R. (3d) 385 (S.C.C.), at p. 407.
26. *Smylie v. The Queen* (1900), 27 O.A.R. 172.
27. *Brooks-Bidlake and Whittall, Limited v. Attorney General for British Columbia*, [1923] A.C. 450 (P.C.).

28. *Attorney General of British Columbia v. Attorney General of Canada*, [1924] A.C. 203 (P.C.).
29. W. Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resources Amendment to the Constitution" (1983), 21 *Alta. L. Rev.* 472, at p. 479.
30. *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan* (1977), 80 D.L.R. (3d) 449 (hereinafter *CIGOL* case) (S.C.C.). For a comment on this case see G. Rémillard, "Chroniques régulières, droit constitutionnel" (1978), 38 *Rev. du Bar.* 199.
31. *Central Canada Potash Co. Limited et al. v. Government of Saskatchewan*, [1978] 6 W.W.R. 400 (S.C.C.).
32. *Spooner Oils Limited and Spooner v. Turner Valley Gas Conservation Board and the Attorney-General for Alberta*, [1933] S.C.R. 629.
33. J. Ballem, "Oil and Gas Under the New Constitution" (1983), 61 *Can. Bar Rev.* 547, at p. 549.
34. Agreement Between the Government of Canada and the Government of Alberta Relating to Energy Pricing and Taxation (hereinafter September 1981 Agreement or Alberta Agreement), September 1, 1981, reproduced in: *Canadian Energy Program Reporter*, (CCH Canadian) at para. 65001. The agreement is discussed in detail in the section on types and examples of agreements.
35. The following articles contain general reviews of the overall operation of s. 92A: Ballem, (1983); Moull, (1983); and Moull, "Section 92A of the Constitution Act, 1867" (1983), 61 *Can. Bar Rev.* 715.
36. R. Harrison, "Constitutional Aspects of Energy Regulation," in *Canada Energy Law Service*, edited by C.D. Hunt and A.R. Lucas (Don Mills: Richard De Boo), at pp. 4-11.
37. *Luscar Collieries Limited v. McDonald*, [1927] A.C. 925 (P.C.).
38. *Re Westspur Pipe Line Co. Gathering System*, [1967] C.T.C. 158, at pp. 177-79.
39. John D. Whyte, *The Constitution and Natural Resources Revenues* (Kingston: Queen's University, Institute of Intergovernmental Relations, Discussion Paper 14, 1982), at p. 16.
40. *Oil and Gas Conservation Stabilization and Development Act*, S.S. 1973-74, c. 72, am. 1973-74, c. 73.
41. *Supra*, *CIGOL*, at p. 464. The nature of the federal government's authority over exports under the trade and commerce clause has of course been the subject of exhaustive treatment by both courts and writers, and we do not propose to deal with it in detail in this overview. However, it should be noted that the federal government may also use this power in the context of imports of natural resources. Thus in *Caloil v. Attorney General of Canada*, [1971] S.C.R. 543, the Supreme Court upheld federal controls on the destination of imported oil, even on transactions occurring entirely in one province, on the grounds that "the true character of the enactment appears to be an incident in the administration of an extraprovincial marketing scheme" and that "the interference with local trade . . . is an integral part of the control of imports" (at p. 551). While this paper is primarily concerned with authority over Canadian natural resources, it should be recognized that the scheme in question had very significant indirect impacts on the development of the western Canadian petroleum industry through the protection afforded it by the "Ottawa Valley line." See further, Rémillard (1977), at pp. 497-501; Hogg (1977), at pp. 271-72.
42. *Reference Re Quotation Set Out in O.C. 1079/80, Concerning Tax Proposed by Parliament of Canada on Exported Natural Gas*, [1981] 3 W.W.R. 408 (Alta. C.A.), at p. 435.
43. *Attorney General of British Columbia v. Attorney General of Canada and Attorney General of Ontario*, [1924] A.C. 222, [1923] 4 D.L.R. 669, 42 C.C.C. 398 (hereinafter *Johnny Walker* case) (P.C.).
44. *Reference Re Questions Set Out in O.C. 1079/80, Concerning Tax Proposed by Parliament of Canada on Exported Natural Gas*, [1981] 3 W.W.R. 408, at p. 437.

45. For a discussion of the extent to which Alberta law has abrogated riparian rights, see: D. Percy, "Water Rights in Alberta" (1977), 15 *Alta. L. Rev.* 142.
46. See, for example, *Public Lands Act*, R.S.A. 1980, c. P-30, s. 3.
47. Extensive discussions of the division of powers in relation to water management are found in: D. Gibson, "The Constitutional Context of Canadian Water Planning" (1968), 7 *Alta. L. Rev.* 71; K.C. Mackenzie, "Interprovincial Rivers in Canada: A Constitutional Challenge" (1961), 1 *U.B.C. L. Rev.* 497; D. Percy, "New Approaches to Interjurisdictional Problems," in *Water Policy for Western Canada: The Issues of the Eighties*. Proceedings of the National Resource Conference, 2d (The Banff Centre School of Management; Calgary, The University of Calgary, 1983), at p. 113; G. La Forest, "Interprovincial Rivers" (1972), 50 *Can. Bar Rev.* 39; L. McGrady, "Jurisdiction for Water Resource Development" (1967), 2 *Man. L.J.* 219; D. Alh  riti  re, *La gestion des eaux en droit constitutionnel canadien* (Qu  bec:   diteur officiel du Qu  bec, 1976). For discussions of some particular aspects of federal-provincial tension, see D. Alh  riti  re, "La comp  tence f  d  rale sur les p  cheries et la lutte contre la pollution des eaux: r  flexions sur le nouveau r  glement de la loi sur les p  cheries" (1972), 13 *Cahiers de Droit* 53; G. L'  cuyer, "Les 'dimensions nationales' et la gestion de l'eau" (1972), 13 *Cahiers de Droit* 231.
48. *Interprovincial Co-operatives Ltd. v. The Queen* (1975), 53 D.L.R. (3d) 321 (S.C.C.).
49. *Fowler v. The Queen*, [1980] 2 S.C.R. 713, 55 C.C.C. (2d) 97.
50. *Fisheries Act*, R.S.C. 1970, c. F-14, as am.
51. *Northwest Falling Contractors Limited v. The Queen*, [1980] 2 S.C.R. 292, 53 C.C.C. (2d) 353.
52. *The Queen v. Crown Zellerbach Can. Ltd.*, [1984] 2 W.W.R. 714 (B.C.C.A.).
53. *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55.
54. *Clean Water Act*, R.S.A. 1980, c. C-13.
55. *A.-G. Canada v. A.-G. Ontario et al.*, [1937] A.C. 326 (P.C.).
56. Some of the early agreements related to Indians and Lands Reserved for the Indians, see for example the agreements between Ontario and the Dominion discussed in G. La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto: University of Toronto Press, 1969), at p. 127 et seq.
57. Reprinted in R.S.C. 1970, Appendices No. 25 at 367 (Manitoba), at 377 (Alberta) and at 385 (Saskatchewan). In the same category are the Terms of Union of British Columbia (R.S.C. 1970, Appendices, No. 10), and Prince Edward Island (R.S.C. 1970, Appendices, No. 12), which were negotiated pursuant to s. 146 of the *Constitution Act, 1867* and which took effect as if enacted by the British Parliament. The Newfoundland Terms of Union (R.S.C. 1970 Appendices, No. 30) were "confirmed and given" the force of law notwithstanding anything in the *British North America Act, 1867 to 1946* by the *Newfoundland Act, 1949*, 12-13 Geo. VI, c. 22 U.K.
58. Agreement of November 25, 1965, listed in: Dept. of Federal and Intergovernmental Affairs, *Inventory of Federal-Provincial Programs in Alberta* (Edmonton, 1981), at p. 233.
59. See, for example, the *British Columbia Indian Reserves Mineral Resources Act*, S.C. 1943, c. 19; S.B.C. 1943, c. 40.
60. For example, the *Prairie Provinces Water Apportionment Agreement*, Alberta O.C. 2053/69, Manitoba O.C. 1359/69, Saskatchewan O.C. 1612/69.
61. Agreement Between the Government of Canada and the Government of Nova Scotia Relating to Oil and Gas Resource Management and Revenue Sharing, March 2, 1982 (hereinafter Canada-Nova Scotia Agreement), reproduced in *Canadian Energy Program Reporter* (CCH: Toronto), at para. 66501.
62. Agreement Between the Government of Canada and the Government of Alberta Relating to Energy Pricing and Taxation (hereinafter September 1981 Agreement or Alberta Agreement), September 1, 1981, as am. June 30, 1983, reproduced id., at para. 65001.
63. See generally, C. Watkins, "Canadian Oil and Gas Pricing" in *Oil in the Seventies: Essays on Energy Policy*, edited by C. Watkins and M. Walker (Vancouver: The

- Fraser Institute, 1977), at pp. 87–124; P. Tyerman, “Pricing of Alberta’s Oil” (1976), 14 *Alta. L. Rev.* 427.
64. A good chronological account of developments in Canadian pricing policy in this period can be found in *An Energy Strategy for Canada: Policies for Self-Reliance* (Ottawa: Department of Energy, Mines and Resources, Energy Policy Sector, 1977), chap. 4.
 65. For a discussion of pricing in the absence of agreement see Hunt and Lucas (eds.) *Canada Energy Law Service* (Don Mills: Richard De Boo), see section on the Alberta Petroleum Marketing Commission.
 66. Alberta accomplished this by regulations promulgated pursuant to what is now s. 116 of the *Mines and Minerals Act*, R.S.A. 1980, c. M–15.
 67. *The National Energy Program 1980* (Ottawa, Department of Energy, Mines and Resources, Energy Policy Sector, Report EP 80–4E), at pp. 15–16:

The Government of Canada believes that the present system is inappropriate and unfair. It believes that more appropriate arrangements must be made, so that the national government, which is accountable to all Canadians, gains access to the funds it needs to support its response to national needs.
 68. W.R. Lederman, “The Constitution: A Basis for Bargaining” in *Natural Resources Revenue: A Test of Federalism*, edited by Anthony Scott (Vancouver: The University of British Columbia Press for the British Columbia Institute for Economic Policy Analysis, 1976), at pp. 52–60.
 69. Unfortunately, so far as the present authors are aware, there is little published legal analysis of the effects and enforceability of intergovernmental agreements within Confederation. F.R. Scott touched on the subject in “The Constitutional Background of Taxation Agreements” (1955), 2 *McGill L.J.* 1 at pp. 5–6. Scott concluded that “Despite the concurrent statutes giving effect to the agreements, nobody is really bound in law to maintain them. Hence no loss of sovereignty takes place when the province enters an agreement . . .” See *In Re Taxation Agreement Between Government of Saskatchewan and Government of Canada*, [1946] 1 W.W.R. 257 (Board of Arbitration). See also D.W. Mundell, “Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them” (1960), 2 *Osgoode Hall L.J.* 56; K. Wiltshire, “Working with Intergovernmental Agreements — the Canadian and Australian Experience” (1980), 23 *Canadian Public Administration* 353.
 70. It might not necessarily follow that the other government should be left with no remedy — might it not have a claim in damages? Common law precedents dealing with the fettering of executive discretion do not necessarily apply to intergovernmental agreements: P. Rogerson, “On the Fettering of Public Powers” [1971] P.L. 288; H. Street, *Governmental Liability: A Comparative Study* (Connecticut: Archon Books, 1975), at pp. 98–99; T.C. Hartley, and J.A.G. Griffith, *Government and Law: An Introduction to the Working of the Constitution in Britain* (London: Weidenfeld & Nicolson, 1975), at pp. 289–92; P.W. Hogg, “The Doctrine of Executive Necessity in the Law of Contract” (1970), 44 *A.L.J.* 154; *Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500; *Blake v. Hendon Corporation*, [1962] 1 Q.B. 283.
 71. The agreement could be relied upon by a third party only if it had some constitutional effect: see by way of analogy *The Queen v. Sutherland, Wilson and the A.-G. of Canada*, [1980] 5 W.W.R. 456 (S.C.C.) and *Jack v. The Queen*, [1979] 5 W.W.R. 364 (S.C.C.). Indians are entitled to rely upon the Natural Resources Transfer Agreements and the B.C. Terms of Union to press their claims.
 72. The PIP program involves the payment of a proportion of the costs of oil and gas exploration. The proportion varies with the Canadian ownership rate and control status of the applicant and the region in which the exploration occurs. Canadian ownership rate and control status is determined under federal legislation, *Canadian Ownership and Control Determination Act*, S.C. 1980–81–82–83, c. 107 (Part II).
 73. Canada-Saskatchewan Agreement, October 26, 1981, *Canada Energy Program Reporter*, at para. 66001, s. 5.
 74. Canada-British Columbia Agreement, September 24, 1981, *id.*, at para. 65501, s. 6.

75. Canada-Saskatchewan Agreement, at para. 7; Saskatchewan's objections and its agreement also applied to the Petroleum and Gas Revenue Tax and the Incremental Oil Revenue Tax. The liability of the provincial Crown corporations has therefore been left undecided.
76. September 1, 1981 Agreement, Schedule C and see also Alta. Reg. 412/81.
77. *Reference Re Anti-Inflation Act* (1976), 68 D.L.R. (3d) 452 (S.C.C.); *Re Manitoba Government Employees Association and Government of Manitoba et al.* (1979), 79 D.L.R. (3d) 1 (S.C.C.).
78. *Natural Gas Pricing Agreement Amendment Act, 1981*, S.A. 1981, c. 57.
79. *Petroleum Marketing Act*, R.S.A. 1980, c. P-5; it may be that the authority for the oil agreement is derived from s. 4, *Department of Energy and Natural Resources Act*, R.S.A. 1980, c. D-18, but the marginal note suggests that the section was not intended to serve this function.
80. Canada-Nova Scotia Agreement in *Canadian Energy Program Reporter*, at para. 66501.
81. The September 1981 Agreement contained a similar clause.
82. Examples of the federal delegation of power are contained in: Department of Energy, Mines and Resources. *Communique* 84/49, May 31, 1984. The ministerial delegations for Sable Island and the Bay of Fundy are particularly noteworthy for they provide that discretions of the federal minister are to be exercised by the provincial minister of mines and energy for these areas. The federal *Canada-Nova Scotia Oil and Gas Agreement Act*, Bill C-43, was introduced May 31, 1984. The bill will give effect to statutory amendments to federal legislation in order to implement the agreement.
83. *Oil and Gas Agreement Act*, S.N.S. 1983, c. 8 and for comment see G.J. Doucet, "Canada-Nova Scotia Agreement: One Year Later" (1984), 22 *Alta. L. Rev.* 132.
84. Alberta O.C. 2053/69, Manitoba O.C. 1359/69, Saskatchewan O.C. 1612/69; B.J. Barton, "The Prairie Provinces Water Board as a Model for the Mackenzie River Basin," in *Institutional Arrangements for Water Management in the Mackenzie River Basin*, edited by Barry Sadler (Calgary: University of Calgary Press, 1984), at pp. 37-67. The current agreement dates from 1969, but there was an earlier agreement negotiated in 1948, see Alberta O.C. 2053/69. The Apportionment Agreement consists of two agreements executed by Canada, Alberta, Saskatchewan and Manitoba, and two bilateral agreements between Alberta and Saskatchewan, and Saskatchewan and Manitoba respectively.
85. The current legislative authority to enter into the Apportionment Agreement is clearly laid out in the respective provincial legislation: Alberta: *Water Resources Act*, R.S.A. 1970, c. 388, s. 75 (now R.S.A. 1980, c. W-5, s. 71); Manitoba: *The Water Power Act*, R.S.M. 1970, c. W-70, s. 15; Saskatchewan: *Water Rights Act*, R.S.S. 1978, c. W-8, s. 14 and *Water Resources Management Act*, R.S.S. 1978, c. W-7, ss. 12 to 14. The Prairie provinces all had identical or similar legislation in place at the time the 1969 agreement was negotiated. The federal authority is rather more doubtful. The federal Inland Waters Directorate takes the position that since the 1969 agreement predates the *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5, the legislative authority was derived from the *Resources and Technical Surveys Act*, R.S.C. 1970, c. R-7 (letter to the authors April 12, 1984). The only section of this act that could be remotely useful is s. 7(2), but even this appears to be extremely thin authority.
86. For a review of federal-provincial agreements and arrangements under the *Canada Water Act*, see: *Canada Water Act: annual report 1982-83* (Ottawa: Department of the Environment).
87. The Mackenzie River Basin Agreement, April 1, 1978, was negotiated under the federal authority of both the *Canada Water Act* and the *Northern Inland Waters Act*, R.S.C. 1970 (1st Supp.), c. 28, s. 5, both of which make specific provision for interjurisdictional agreements. The agreement proposed a joint work program and the sharing of costs. It makes no reference to remedies or court jurisdiction.
88. Yukon River Basin Agreement, 24 November 1980, the comments on the Mackenzie River Basin Agreement, *id.*, apply here equally.

89. For example, *An Agreement Respecting Flood Risk Mapping and Other Flood Damages Reduction Measures in the Province of Ontario*, 31 March 1978.
90. *An Agreement Respecting the Upgrading of Ring Dykes in the Red River Valley*, 10 March 1983.
91. See statutes cited *supra*, at note 85.
92. *Department of Regional Economic Expansion Act*, R.S.C. 1970, c. R-4, and various DREE Annual Reports. Section 8 of the act provides the authority to enter into federal-provincial agreements. Prior to DREE, mineral survey agreements were signed with many provinces under the *Federal-Provincial Aeromagnetic Survey Program; Resources and Technical Surveys Act*, R.S.C. 1970, c. R-7, s. 7(2).
93. See for example the *Canada-Saskatchewan Subsidiary Agreements on Mineral Exploration and Development*, June 21, 1974, and on *Iron, Steel and Related Metal Industries*, July 1974. For the provincial authority see *Department of Natural Resources Act*, R.S.S. 1978, c. D-20, s. 8.
94. W.H. Rompkey, "Notes for an Address to the Mining Association of Canada," May 16, 1984, in *Communiqué* 84/46 (Ottawa: Department of Energy, Mines and Resources), at p. 4.
95. *Communiqué* 81/79, (Department of Energy, Mines and Resources). There is no explicit provision in the *Department of Energy, Mines and Resources Act*, R.S.C. 1970, c. E-6, dealing with federal-provincial agreements.
96. For example, the *Canada-New Brunswick Subsidiary Agreement on Forestry*, 15 October 1974; see *Forest Service Act*, R.S.N.B. 1973, c. F-20, s. 4(1). Most provinces have general legislation permitting the Lieutenant-Governor-in-Council to enter into agreements with Canada or another province; see, British Columbia: *Ministry of Forests Act*, R.S.B.C. 1979, c. 272, s. 6(a); Saskatchewan: *Forests Act*, R.S.S. 1978, c. F-19, s. 57. Earlier forestry agreements had been negotiated with the Dominion under the *Canada Forestry Act*, R.S.C. 1952, c. 24, s. 6(a), and the *Department of Forestry Act*, S.C. 1960, c. 41, s. 6(1)(c).
97. Department of the Environment, *Discussion Paper* (September 30, 1981).
98. Department of the Environment, *Policy Statement — A Framework for Forest Renewal* (September 2, 1982).
99. See L.M. Govin and B. Claxton, *Legislative Expedients and Devices Adopted by the Dominion and the Provinces*, a study prepared for the Royal Commission on Dominion-Provincial Relations, Ottawa, 1939.
100. For an analysis of the federal spending power that also refers to American and Australian experience, see J. Dupont, "Le pouvoir de dépenser du gouvernement fédéral: 'A Dead Issue'?" (1967), *U.B.C.L. Rev. — Cahiers de Droit Centennial*, ed. 69. Also, see generally D.V. Smiley, *Conditional Grants and Canadian Federation* (Toronto, Canadian Tax Foundation, 1963), and Hogg, *supra*, note 3 at pp. 68–72.
101. *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 355 (P.C.).
102. *Petroleum Incentives Program Act*, S.C. 1980–81–82–83, c. 107 (Part I); Dept. of Energy, Mines and Resources, *The Petroleum Incentives Program* (Ottawa, M27–27/1981E, 1981).
103. See generally: W.R. Lederman, "Some Forms and Limitations of Co-operative Federalism" (1967), 45 *Can. Bar Rev.* 409; E.A. Driedger, "The Interaction of Federal and Provincial Laws" (1976), 54 *Can. Bar Rev.* 695; G. La Forest, "Delegation of Legislative Power in Canada" (1975), 12 *McGill L.J.* 131; P. Blanche, "Délégation et Fédéralisme Canadien" (1976), 6 *R.D.U.S.* 235; D.K. Singh, "Legislative Schemes in Australia" (1964), 4 *Melbourne U.L. Rev.* 355.
104. *An Act for the Settlement of Certain Questions Between the Government of Canada and Ontario Respecting Indian Reserve Lands*, S.C. 1924, c. 48; S.O. 1924, c. 15.
105. See, for example, the *British Columbia Indian Reserves Mineral Resources Act*, S.C. 1943, c. 19; S.B.C. 1943, c. 40.
106. It should be noted, though, that provincial legislation with respect to lands and resources does have a valid jurisdictional base — it is simply being applied in an area where it would ordinarily be invalid, i.e., Indian reserves.

107. *R. v. Tenale* (1982), 134 D.L.R. (3d) 654 (B.C. Co. Ct.) affd on appeal (1983), 42 B.C.L.R. 91 (B.C.C.A.) on other grounds; on the other side of the line is *Re Shoal Lake Band of Indians No. 39 et al. v. The Queen in Right of Ontario* (1980), 101 D.L.R. (3d) 132 (Ont. H.C.).
108. *R. v. Tenale* (1982), 134 D.L.R. (3d) 654, at p. 659. The judgment was upheld on appeal but on other grounds, namely invalid subdelegation and failure to publish federal regulations as required by the *Statutory Instruments Act*, S.C. 1970-71-72, c. 38.
109. *A.-G. British Columbia v. Esquimalt and Nanaimo Railway Co.*, [1950] A.C. 87 (P.C.) per Lord Greene. The Privy Council, in the course of interpreting agreements between a railway company, the province and the dominion, noted that there were four elements of a contract — offer, acceptance, consideration, and intention to contract: “Agreements were entered into in contractual form between the province and the Dominion . . .” (at p. 108).
110. There is no constitutional provision giving any court jurisdiction, but the Federal Court may be given jurisdiction by the agreement of the province: *Federal Court Act*, R.S.C. 1970 (2d Supp.), c. 10, s. 19, and reciprocal provincial legislation, e.g., Alberta: *Judicature Act*, R.S.A. 1980, c. J-1, s. 28; G. La Forest, “Interprovincial Rivers” (1972), 50 *Can. Bar Rev.* 39, at pp. 46-49.
111. Is it seemly for one government to be able to force-litigate the terms of an agreement that the other government may consider to be “political” rather than “legal”? The better view is that the Federal Court reciprocal legislation acts as a consent to the compulsory jurisdiction of the court but may be repealed at any time, see Duff J. in *Province of Ontario v. Dominion of Canada* (1907-1910), 42 S.C.R. 1, at p. 119:
The statute referred to [*Exchequer Court Act*] and the correlative statute of the province once for all give a legal sanction to such proceedings, and provide a tribunal (where none existed) by which, at the instance of either of them, their reciprocal rights and obligations touching any dispute may be ascertained and authoritatively declared.
The procedure is not unlike the “optional clause” of Article 36 of the Statute of the International Court of Justice.
112. Would there ever be a case for applying international law rules of construction and interpretation to an interjurisdictional dispute? The Privy Council has stated in *Dominion of Canada v. Province of Ontario*, [1910] A.C. 637, at p. 645 affg (1907-1910), 42 S.C.R. 1, that when the Exchequer (Federal) Court obtains jurisdiction under reciprocal legislation, the court is under a duty to apply legal principles and not its own view of what might be thought to be fair. Difficulties may arise on choosing between legal principles of, for example, the dominion or a province, but the conflict (if conflict there be) is a conflict between one set of legal principles and another. In the S.C.C. both Duff and Idington JJ. were of the view that the court should apply Ontario law (*lex situs*) to the case rather than, for example, the Quebec civil law (1907-1910), 42 S.C.R. 1, at p. 102 and p. 122.
113. In the *Precious Metals* case, *A.-G. British Columbia v. A.-G. Canada* (1889), 14 App. Cas. 295 (P.C.), both the S.C.C. and the P.C. held that Article 11 of the British Columbia Terms of Union should be interpreted as a private, commercial conveyance rather than “as a statutory compact between two constitutional governments.”
114. *A.-G. Canada v. Higbie*, [1945] S.C.R. 385.
115. A dispute did arise between Alberta and Canada over the interpretation of the old oil price escalation and as to whether the price could ever be reduced. However, the dispute was settled politically by an amending agreement in June 1983.
116. *In Re the Interpretation of a Certain Agreement Entered Into Between Canada and Alberta on March 29, 1973*, [1983] 1 F.C. 567 (T.D.).
117. Hogg, *Constitutional Law of Canada* (1977), chapter 6.
118. The precise test for the application of federal paramountcy is discussed in *Multiple Access v. McCutcheon*, [1982] S.C.R. 161, 138 D.L.R. (3d) 1, especially per Dickson J.; *The Queen v. Crown Zellerbach Can. Ltd.*, [1984] 2 W.W.R. 714 (B.C.C.A.).
119. *Fulton et al. v. Energy Resources Conservation Board and Calgary Power Ltd.* (1981), 118 D.L.R. (3d) 577 (S.C.C.), at p. 584 per Laskin C.J.C. for the court. The limited

- scope of the *Fulton* case is illustrated by *Re Town of Summerside and Maritime Electric Co. Ltd.* No. 2, [1984] 3 D.L.R. (4th) 577 (P.E.I.S.C.).
120. *Id.*, at 587; see Leo Barry, "Interprovincial Electrical Energy Transfers: The Constitutional Background," in *Energy Crisis: Policy Response*, edited by P.N. Nemetz (Montreal: Institute for Research on Public Policy, 1981).
 121. *An Act to Amend the National Energy Board Act* (No. 3), S.C. 1980-81-82-83, c. 116, s. 32.
 122. Now TransAlta Utilities, see: House of Commons, Standing Committee on Energy Legislation, 1st Sess., 32nd Parl., at 29: 35, per Lalonde.
 123. *Id.*, at 29: 17 to 29: 18, per Lalonde.
 124. It is worth noting that Commonwealth government in Australia has used its power over exports as a lever to assert a role in natural resource developments in the states—especially with respect to environmental requirements. The federal government does have legislation in place that could easily be adapted for a more interventionist stance—the *Export and Import Permits Act*, R.S.C. 1970, c. E-17. For ore mined in the Northwest Territories, the Canada Mining Regulations, C.R.C. 1978, c. 1516, s. 76(1), require an export permit for concentrate once production exceeds a gross value of \$100,000 in any calendar year. For a rather questionable legislative provision for provincial control over mineral exports see *infra*, note 133.
 125. D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U. Toronto L.J.* 54. On the more specific questions of federal jurisdiction over water and air pollution, see respectively Alh  riti  re, *supra*, note 47; and, by the same author, "Les probl  mes constitutionnels de la lutte contre la pollution de l'espace atmosph  rique du Canada" (1972), 50 *Can. Bar Rev.* 561.
 126. See *Fowler v. The Queen*, [1980] 5 W.W.R. 511 (S.C.C.) and *Northwest Falling Contractors Ltd. v. The Queen*, [1981] 1 W.W.R. 681 (S.C.C.), at p. 688, "The power to control and regulate that resource (i.e., fisheries) must include the authority to protect all those creatures which form a part of the system" per Martland J. See also *R. v. MacMillan Bloedel Ltd.*, [1984] 2 W.W.R. 699 (B.C.C.A.).
 127. See: Federal Environmental Assessment and Review Office, *Revised Guide to the Federal Environmental Assessment and Review Process* (May 1979); D. Paul Emond, *Environmental Assessment Law in Canada* (Toronto: Emond Montgomery, 1978), chap. 5.
 128. In other cases, federal EARP panels have been established with provincial cooperation or have utilized provincial officials. For example, the Province of Ontario was consulted in connection with the selection of panel members for the Port Granby Uranium Refinery hearings and a British Columbia civil servant was a member of the Roberts Bank EARP panel.
 129. *Attorney-General of British Columbia v. Attorney-General of Canada*, [1924] A.C. 203 (P.C.). As conflicting with validly enacted Canadian treaty commitments with Japan, providing for non-discrimination with respect to Japanese subjects. Admittedly, *Brookes-Bidlake* could be distinguished on the grounds that, regardless of the conditions attaching to Japanese workers, the condition with respect to Chinese labour was severable and had clearly been breached.
 130. Thus in *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), the Privy Council struck down British Columbia legislation prohibiting use of Chinese labour in mines.
 131. *Cf.*, *Bonanza Creek Gold Mining v. The King*, [1916] A.C. 566 (P.C.), at p. 580, and Hogg, *Constitutional Law*, at p. 392.
 132. As, by analogy, it invoked, pursuant to s. 132, the treaty commitments with respect to Japanese nationals. See *supra*, note 129.
 133. Another statute that similarly could be open to question is British Columbia's *Mineral Processing Act*, R.S.B.C. 1979, c. 261, which contains, inter alia, the rather remarkable provisions that:

2. All minerals produced in the Province shall be processed, smelted and

refined in the Province subject to this Act and the availability of processing, smelting and refining facilities in the Province.

Direction by minister

3. (1) Notwithstanding an agreement to the contrary, the minister may, by notice in writing, direct the owner or manager of a producing mine in the Province to deliver a maximum of 50% of the minerals produced by that mining operation to a processing plant, smelter or refinery in the Province designated by the minister capable of and equipped to further process, smelt or refine the ore, concentrates or semiprocessed metals.

(2) Notwithstanding an agreement to the contrary, the minister may, by notice in writing direct the owner or manager of a producing plant, smelter or refinery in the Province to accept delivery of, process, smelt or refine the quantity of minerals from the producing mines, to be carried out within the period of time and at the cost to the producing mine that the minister may determine and direct and he may make orders respecting the efficiency of operation of the producing plant, smelter or refinery.

134. The best survey is probably found in Allan Tupper and G. Bruce Doern, (eds.), *Public Corporations and Public Policy in Canada* (Montreal: The Institute for Research on Public Policy, 1981). See also C.A. Ashley and R.G.H. Smalls, *Canadian Crown Corporations* (Toronto: Macmillan, 1965). Especially useful for a discussion of legal aspects of Crown corporations is J. Robert S. Prichard (ed.), *Crown Corporations in Canada, The Calculus of Instrument Choice* (Toronto: Butterworth, 1983).
135. *British Columbia Power Corp. v. A.-G. British Columbia et al.* (1965), 47 D.L.R. (2d) 633, 44 W.W.R. (N.S.) 65 (B.C.S.C.).
136. [1924] A.C. 222, [1923] 4 D.L.R. 669, 42 C.C.C. 398 (P.C.).
137. *Reference Re Proposed Federal Tax on Exported Natural Gas* (1982), 136 D.L.R. (3d) 385, [1982] 5 W.W.R. 577 (S.C.C.), affg (1981), 122 D.L.R. (3d) 48, [1981] 3 W.W.R. 408.
138. G.V. La Forest, *The Allocation of Taxing Power Under the Canadian Constitution* (Toronto: Canadian Tax Foundation, 2d ed., 1981), at pp. 186–87.
139. Canada-Saskatchewan Agreement, October 26, 1981, *Canada Energy Program Reporter*, at para. 66001, s. 5, and the Alberta Agreement, September 1, 1981, as am. June 30, 1983, reproduced id., at para. 65001.
140. Canada-British Columbia Agreement, September 24, 1981, id., at para. 65501, s. 6.
141. For a discussion see Tupper and Doern, *supra*, note 134, chap. 2.
142. *Petro-Canada Act*, S.C. 1974–75–76, c. 61, s. 14(5).
143. There is some brief discussion in G.B. Doern, “The Role of Royal Commissions in the General Policy Process and in Federal-Provincial Relations” (1967), 10 *Can. Pub. Admin.* 417, at p. 428 et seq.
144. J.E. Hodgetts, “The Role of Royal Commissions in Canadian Government,” in *Proceedings of the Third Annual Conference of the Institute of Public Administration of Canada* (1951), Toronto: 1952, at pp. 354–55; cited in G.F. Henderson, *Federal Royal Commissions in Canada, 1867–1966: A Checklist* (Toronto: University of Toronto Press, 1967), at p. 12.
145. Royal Commission on the Natural Resources of Saskatchewan, appointed on December 29, 1933 by Order-in-Council P.C. 2722 under Part I of the *Inquiries Act*, R.S.C. 1970, c. 1-13; Royal Commission on the Natural Resources of Alberta, appointed on July 19, 1934 by Order-in-Council P.C. 1588 under Part I of the *Inquiries Act*.
146. Memorandum of Agreement between the Government of the Dominion of Canada and the Government of the Province of Alberta, in Schedule to *Constitution Act, 1930*, R.S.C. 1970, Appendix II: No. 25. There is an equivalent agreement in the Schedule for Saskatchewan.
147. Royal Commission on Energy, appointed on October 15, 1957 by Order in Council P.C. 1957–1386 under Part I of the *Inquiries Act*, R.S.C. 1970, c. 1-13.
148. Royal Commission on Energy. *First Report* (October 1958); *Second Report* (July 1959).

149. Royal Commission on the Health and Safety of Workers in Mines, appointed on September 10, 1974 by Order-in-Council 2340/74 under the *Public Inquiries Act*, S.O. 1979 (Supp.), c. 49.
150. Royal Commission of Inquiry into Uranium Mining. *Health and Environmental Protection, Uranium Mining — Interim Report* (Victoria, B.C., 1979).
151. Saskatchewan Cluff Lake Board of Inquiry, *Final Report* (1978).
152. Royal Commission Respecting Radiation, Compensation and Safety at the Fluorspar Mines, St. Lawrence, Newfoundland, *Report* (1967).
153. G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168 — a good review of the origins of references and discussion of some of the cases. J.F. Davison, "The Constitutionality and Utility of Advisory Opinions" (1937–38), 2 *U. of Toronto L.J.* 254, at p. 259 — a comparison of the experience of the U.S. Supreme Court and the Supreme Court of Canada—Davison doubts the utility of references. B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto: University of Toronto Press, 1968), chap. 7 — Strayer weighs the advantages and disadvantages of references, concluding that they do perform a useful function but should be more carefully used and applied; see also chap. 9 of the second edition of this work *sub nom. The Canadian Constitution and the Courts* (Toronto: Butterworth, 1983).
154. *Reference Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792.
155. *A.-G. Canada v. A.-G. British Columbia*, [1984] 4 W.W.R. 289 (S.C.C.).
156. *Reference Re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland* (1984), 5 D.L.R. (4th) 385 (S.C.C.); *Reference Re Mineral and Other Natural Resources of the Continental Shelf* (1983), 145 D.L.R. (3d) 9 (Nfld. C.A.). The question of jurisdiction over the continental shelf was raised tangentially in *Re Seafarers' International Union of Canada-CLC-AFL-CIO and Crosbie Offshore Services Ltd. et al.* (1982), 135 D.L.R. (3d) 485 (F.C.A.) but the case (an application for review of a decision of the Canada Labour Relations Board) was answered on narrower grounds.
157. *Reference Re Proposed Federal Tax on Exported Natural Gas* (1982), 136 D.L.R. (3d) 385, [1982] 5 W.W.R. 577 (S.C.C.).
158. *Churchill Falls Labrador Corp. et al. v. A.-G. Newfoundland and A.-G. Canada et al.* (1984), 8 D.L.R. (4th) 1. *revg. sub nom. Reference Re Upper Churchill Water Rights Reversion Act, 1980* (1982), 134 D.L.R. (3d) 288 (Nfld. C.A.).
159. *Reference Re Amendment of the Constitution of Canada* (1981), 117 D.L.R. (3d) 1 (Man. C.A.) (Manitoba Patriation Reference); *Reference Re Amendment of the Constitution of Canada (No. 2)* (1981), 118 D.L.R. (3d) 1 (Nfld. C.A.) (Newfoundland Patriation Reference); *Reference Re Amendment of the Constitution of Canada (No. 3)* (1981), 120 D.L.R. (3d) 385 (Que. C.A.) (Quebec Patriation Reference).
160. Both federal and provincial legislation provide that the respective attorney-general shall be informed where the constitutional validity of the enactment of another level of government is put at issue: e.g., *Supreme Court Act*, R.S.C. 1970, c. S-19, s. 55(3); *Judicature Act*, R.S.A. 1980, c. J-1, s. 27(2); *Constitutional Question Act*, R.S.B.C. c. 63, s. 3. In *McEvoy v. A.-G. New Brunswick and A.-G. Canada* (1983), 148 D.L.R. (3d) 25 (S.C.C.), the court expressly left open the constitutional propriety of provincial reference legislation which permitted the validity of existing or pending federal legislation to be questioned before provincial courts (at p. 29).
161. *Id.*, at pp. 581–82, the characterization of the provincial argument is that of Lord Loreburn L.C.
162. *Reference Re Water and Water Powers*, [1929] S.C.R. 200. This reference may not be a particularly good example to choose since many commentators have suggested that the result was somewhat inconclusive.
163. The history of the reference is referred to in the case report, *id.*, at pp. 204–209. Other references have been initiated with provincial consent, e.g., *Reference Re Adoption Act*, [1938] S.C.R. 398, and *Reference Re Farm Products Marketing Act*, [1957] S.C.R. 198.

164. *Reference Re Water and Water Powers*, [1929] S.C.R. 200, at p. 204.
165. *A.-G. Manitoba v. The Manitoba Egg and Poultry Association*, [1971] S.C.R. 689.
166. Paul C. Weiler, "The Supreme Court of Canada and Canadian Federation" (1973), 11 *Osgoode Hall L.J.* 225; Paul C. Weiler, *In the Last Resort* (Toronto: Carswell/Methuen, 1974), at p. 150.
167. "... (T)he lack of a factual underpinning for the issues that are raised ..." was also of concern to Laskin J.; nevertheless, he did proceed to answer the question posed, [1971] S.C.R. 689, at p. 701.
168. See, e.g., B.L. Strayer, *The Canadian Constitution and the Courts* (Toronto: Butterworth, 1983), at p. 290. Strayer points out that facts can be presented to the court on a reference, and that the Supreme Court has recently encouraged this trend.
169. *Gas Export Tax Reference*, [1981] 3 W.W.R. 408, at p. 413; the court was not deterred from answering the questions posed by the fact that the bill might be amended or withdrawn.
170. Canada, House of Commons, Standing Committee on Energy Legislation, 1st Sess., 32nd Parl., Issue No. 26 at 16, evidence of Mr. Marshall, 25 May 1982.
171. After the case had been argued before the Supreme Court, the parties sought and were granted a series of delays in the rendering of judgment in order to permit more time for negotiation.
172. *Reference Re Mineral and Other Natural Resources of the Continental Shelf*, (1983) 145 D.L.R. (3d) 9 (Nfld. C.A.); the *Georgia Strait Reference* similarly focussed on provincial property rights.
173. The questions posed were the same as for the *Offshore Minerals Reference*, [1967] S.C.R. 792, except that a third question was not posed: "Are the said lands the property of Canada or British Columbia?"
174. House of Commons. *Debates*, May 19, 1982 at 17587, Hon. Allan J. MacEachen.
175. *Supra*, note 159.
176. By the same token "... on a reference of this nature, the court may answer only the questions put and may not conjure up questions of its own which, in turn, would lead to uninvited answers," *Reference Re the Constitution* (1981), 125 D.L.R. (3d) 1 (S.C.C.), at p. 108 (dissent).
177. *A.-G. British Columbia v. A.-G. Canada*, [1914] A.C. 153 (P.C.), at p. 162, quoted with approval in *Reference Re Water and Water Powers*, [1929] S.C.R. 200, at p. 227.
178. *Reference Re Water and Water Powers*, [1929] S.R.C. 200, at p. 226.
179. *John Deere Plow Co. v. Wharton*, [1915] A.C. 330 (P.C.), at pp. 341-42.
180. *Reference Re Constitution of Canada* (1981), 125 D.L.R. (3d) 1 (S.C.C.), at p. 108 (dissent). For a recent general discussion of the problems involved in the use of references, see the *McEvoy* case, *supra*, note 160.
181. *Reference Re Upper Churchill Water Rights Reversion Act, 1980* (1982), 134 D.L.R. (3d) 288 (Nfld. C.A.), at p. 315.
182. *An Act for Expediting the Decision of Constitutional and Other Provincial Questions*, R.S.M. 1970, c. C-180, s. 2; *Judicature Act*, R.S.N. 1970, c. 187, s. 6; *Court of Appeal Reference Act*, R.S.Q. 1977, c. R-23, s. 1.
183. The matter was put directly in issue by the Newfoundland and Manitoba references and more indirectly by the Quebec reference.
184. Manitoba Reference, *supra*, note 159, at pp. 26-30 per Hall J.A.
185. *Quebec Reference*, *supra*, note 159 at p. 450; *Newfoundland Reference*, *supra*, note 159 at p. 8; *Manitoba Reference*, *supra*, note 159 at p. 13 (Freedman C.J.M.) and at p. 35 (Matas J.A.); *Reference Re Constitution of Canada* (1983), 125 D.L.R. (3d) 1 (S.C.C.), at p. 88.
186. P.W. Hogg, "Comment" (1982), 60 Can. Bar Rev. 307, at pp. 320-25; Brandt "Judicial Mediation of Political Disputes" (1982), 20 *Univ. Western Ont. L. Rev.* 101, at pp. 108-12.
187. B.L. Strayer, *The Canadian Constitution and the Courts* (Toronto: Butterworth, 2d ed., 1983), at p. 295:

From 1867 to 1966, of the 129 constitutional cases reaching the highest available court (the Judicial Committee of the Privy Council until 1949, the Supreme Court of Canada thereafter), 37 or roughly 25% were references; in the period 1967–1981, of 51 constitutional cases in the Supreme Court, 5 or roughly 10% were references.

188. *Fowler v. The Queen*, [1980] 2 S.C.R. 713, 55 C.C.C. (2d) 97.
189. *Central Canada Potash Co. Limited et al. v. Government of Saskatchewan*, [1978] 6 W.W.R. 400 (S.C.C.).
190. *Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan* (1977), 80 D.L.R. (3d) 449 (S.C.C.) (hereinafter *CIGOL* case).
191. See for example Strayer, *supra*, note 153, at pp. 294–95.
192. See Weiler, *supra*, note 166.
193. See Hogg, *supra*, note 186.
194. It is very rare for a court even to note that a decision which is being considered or applied is a reference rather than a contentious case.
195. *The Queen v. Crown Zellerbach Canada Limited*, [1984] 2 W.W.R. 71 (B.C.C.A.), at p. 722. The question of which waters are “inland waters” could well be determined systematically by agreement — a precedent of sorts exists in the “Six Harbours Agreement” discussed in *A.-G. Canada v. Highbie*, [1945] S.C.R. 385.
196. W.R. Lederman, “The Constitution: A Basis for Bargaining,” in *Natural Resource Revenues, A Test of Federalism*, edited by Anthony Scott (Vancouver: The University of British Columbia Press for the British Columbia Institute for Economic Policy Analysis, 1976), at pp. 52–60.



Transportation and Communications

The Constitution and the Canadian Economic Union

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Introduction

The purpose of this study is to assess the degree to which the existing constitutional and regulatory framework governing the transportation and communications sectors enhances or impedes the development of an economic union in Canada.

In approaching this issue, it has been assumed that the basic tenets of an economic union include the establishment of a common market in which obstacles to the free movement of goods, labour, services and capital are removed, and the harmonization and integration of laws and policies in the constituent elements of the union to facilitate industrial rationalization and development.

The study begins by examining the legal or constitutional division of jurisdiction between the federal and provincial levels of government with respect to transportation and communications and the resultant regulatory framework. This analysis is intended to identify any deviations in the regulatory scheme from the constitutional framework and to identify the principal areas of disputed jurisdiction in these sectors.

Against this background, the study defines the concept of economic union and analyzes the degree to which the current constitutional and regulatory frameworks enhance or impede the development of an economic union in Canada. Specific services within the transportation and communications sectors have been examined with a view to identifying impediments to economic union which might be caused by the constitutional framework. Following this analysis, the study reviews the importance of the transportation and communications sectors in building the Canadian nation and analyzes a number of the attempts made to facili-

tate and rationalize the regulation of these sectors through constitutional or statutory change. The study concludes with a number of recommendations for facilitating the development of an economic union in these two key industrial sectors.

The Federal and Provincial Domains

In the first section of this study, the existing constitutional framework for the regulation of transportation and communications in Canada will be examined. The legal or constitutional division of jurisdiction between the federal and provincial levels of government will be analyzed, and the leading cases and judicial doctrines which have been applied in interpreting sections 91 and 92 of the *Constitution Act, 1867* to effect this division of powers will be discussed. The resulting legal framework for the regulation of these two industrial sectors will then be described.

Following this analysis, the current regulation of the transportation and communications sectors will be described and analyzed with a view to identifying any deviations from the constitutional framework. The manner in which such deviations were achieved — whether by legislative or non-legislative means — will be examined.

Finally, against this background, some of the principal areas of disputed jurisdiction will be identified and discussed with a view to identifying the principal elements of discord that exist between the two levels of government. Consideration will be given to the degree to which the constitutional framework gives rise to these disputes and the failure of the two levels of government to circumvent them by non-legislative means.

The Constitutional Framework

The *Constitution Act, 1867*¹ does not expressly confer jurisdiction over the general headings of transportation or communications on either Parliament or the provincial legislatures.

Federal jurisdiction in the areas of transportation and communications is primarily based on subsections 92(10) and 91(29) of the *Constitution Act, 1867*, which assign jurisdiction to Parliament over what have become known as “interprovincial undertakings.” The power contained in the preamble to section 91 of that Act to make laws for the “peace, order and good government of Canada” has also provided a source of federal jurisdiction. In addition, certain specific modes of transportation are identified in subsections 91(9), (10) and (13) of the Act as being subject to exclusive federal jurisdiction.

Provincial jurisdiction over transportation and communications has generally been based on subsections 92(10), (13) and (16) of the *Constitution Act, 1867*, conferring power to legislate with respect to “local works

and undertakings,” “property and civil rights within the province” and “matters of a merely local or private nature within the province.”

With certain limited exceptions, the division of powers between the two levels of government has thus focussed on the dichotomy between, on the one hand, interprovincial and international undertakings or matters with a national dimension or of national concern and, on the other, local undertakings or matters of a local or private nature.

The following portion of this study will be devoted to analyzing the manner in which the courts have interpreted the relevant sections of the *Constitution Act, 1867* and drawn the division between the respective jurisdictions of the federal and provincial levels of government.

INTERPROVINCIAL AND INTRAPROVINCIAL WORKS AND UNDERTAKINGS

Subsection 92(10) of the *Constitution Act, 1867* confers on each province the exclusive power to make laws in relation to “local works and undertakings” other than certain specific classes of works and undertakings set forth in the subsection. Since subsection 91(29) confers on the federal government the power to legislate with respect to the classes of subjects expressly excepted from provincial jurisdiction, subsection 92(10) is as important for what it excludes from the realm of provincial jurisdiction as for what it includes. The provision reads as follows:

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say,
10. Local Works and Undertakings other than such as are of the following Classes:
 - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country;
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

Paragraphs 92(10)(a) and (b) are framed in a manner which bases jurisdiction not on the mode of transportation or communication under consideration but, rather, on the extent to which the “works and undertakings” providing the service in question connect more than one province or extend beyond the limits of a single province. Much of the judicial consideration of this provision has naturally dwelled on what constitutes a “work and undertaking,” what constitutes an “interprovincial” work

and undertaking, and the degree to which federal jurisdiction over an interprovincial work and undertaking may be extended to an otherwise purely local or provincial undertaking whose services or facilities are required to facilitate the operations of an interprovincial undertaking within a province. These issues are addressed in turn below.

Works and Undertakings

"Undertakings" involve both a physical and an organizational element which are integrated into an operational form. The term was described by Viscount Dunedin in the *Radio Reference*² as ". . . an arrangement under which . . . physical things are used."

Similarly, in *C.P.R. v. A.-G. for B.C.*,³ Lord Reid equated "undertakings" with "organization":

Such communications can be provided by organizations or undertakings, but not by inanimate things alone. For this object, the phrase "line of ships" is appropriate: that phrase is commonly used to connote not only the ships concerned but also the organization which makes them regularly available between certain points.⁴

In another case, *A.-G. for Ontario v. Winner*,⁵ the Privy Council considered that a line of buses operating between points in the United States and Canada was analogous to a line of steamships providing similar communication. In that case Lord Porter expressed the view that, "As in ships so in buses it is enough that there is a connecting undertaking."⁶

Although these cases are somewhat vague in defining the attributes of an "undertaking," the term may reasonably be equated with the concept of an "enterprise" or "organization" required to operate the physical plant or equipment comprising the "work."⁷

The Interprovincial Aspect

The courts have had a number of occasions to consider the interpretation of paragraph 92(10)(a) of the *Constitution Act, 1867* and the rule on whether the business operations carried on by a particular undertaking constitute works or undertakings connecting more than one province or extending beyond the limits of a province. Most of the cases to date have dealt with undertakings in various modes of transportation activity.

One of the leading cases on the constitutional classification of transportation undertakings is *Attorney-General of Ontario v. Winner*.⁸ In that case, the Privy Council was called upon to rule on whether a passenger bus line which ran between points located in the provinces of Nova Scotia and New Brunswick and in the United States was subject to the sole jurisdiction of the federal government or whether the province of New Brunswick could validly legislate with respect to that part of its operations located within the province.

In considering this issue, the Privy Council stated that it might accede

to an argument for separated jurisdiction if there were evidence before it that the carrier was engaged in two separate enterprises — one within the province and the other extending beyond the province.⁹ However, no such dual enterprise was found to exist on the facts of the case:

The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the Province and the other wholly within, but it was the same undertaking which was engaged in both activities.¹⁰

In subsequent cases, the courts have developed a test of “regular and continuous” extraprovincial operation to discern whether the undertaking in question is one which connects more than one province.

In *Re Tank Truck Transport Ltd.*¹¹ the issue raised was whether the Ontario *Labour Relations Act* was applicable to an Ontario trucking company delivering some of its loads into Quebec and the United States. The applicant had contended that its operations beyond Ontario into Quebec and the United States rendered it a work or undertaking connecting Ontario with Quebec and extending beyond the limits of Ontario within the meaning of the exception to provincial jurisdiction contained in paragraph 92(10)(a).

In assessing the evidence before it the court noted that in 1959 the applicant had completed a total of 630 trips to points outside Ontario, which represented approximately 6 percent of all trips made by the applicant in that year. There were no separate operating divisions within the applicant company dividing either employees or equipment by reference to provincial or extraprovincial trips. Unlike the undertaking in the *Winner* case, which was mainly interprovincial and international in nature and only incidentally intraprovincial, in this case the operations of the undertaking were predominantly confined to the province of Ontario.¹²

The Ontario High Court, however, rejected the respondent’s contention that the *Winner* case required the interconnecting function to be the main function of the undertaking for it to come within paragraph 92(10)(a):

As appears from the *Winner* case and the *Underwater Gas Developers* case, “undertaking” involves activity and I think that to connect or extend, that activity must be continuous and regular, but if the facts show that a particular undertaking is continuous and regular, as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in s. 10(a) regardless of whether it is of greater or less in extent than that which is carried on within the Province.¹³

The court went on to find that an interprovincial undertaking existed on the facts of the case.

The same conclusion was reached in *Regina v. Cooksville Magistrate’s*

Court, Ex parte Liquid Cargo Lines Ltd.,¹⁴ another case involving an Ontario trucking company carrying loads into Quebec and the United States. The company in question was found to fall within paragraph 92(10)(a) of the *Constitution Act, 1867* despite the fact that in the year and a half period under consideration by the court only 1.6 percent of the trips made by the company's vehicles were to points outside Ontario.¹⁵

More recently, the test of "regular and continuous" activity has been applied to telecommunications traffic emanating from one province and terminating in another. In *Alberta Government v. Canadian Radio-television and Telecommunications Commission*¹⁶ the Federal Court of Canada characterized Alberta Government Telephones as an undertaking engaged in "a significant degree of continuous and regular interprovincial activity" in the transmission of telecommunications traffic to, and the reception of such traffic from, points outside the province of Alberta.

On the other hand, where the extraprovincial operation of a company is casual and unscheduled, rather than continuous and regular, the undertaking will not be considered one which connects provinces.¹⁷

In addition, a purely physical work, such as a highway located within a single province — but connected to another province's road system to form an interprovincial route — has been held not to constitute an interprovincial work or undertaking within the meaning of paragraph 92(10)(a) merely because it abuts an adjacent highway in another province. The New Brunswick Supreme Court held in *SMT (Eastern) Ltd. v. Ruch*¹⁸ that this type of highway is a local work subject to provincial jurisdiction.

Functional Integrality

As mentioned above, the courts have not only been called upon to rule on whether single undertakings connect one province with another or otherwise extend beyond the limits of a single province. Many of the cases have dealt with the issue of whether the operations of an otherwise purely local undertaking are so integral to the operations of an interprovincial undertaking as to render it subject to federal jurisdiction.

The leading case on functional integrality is *Reference re Industrial Relations and Disputes Investigation Act* (the *Stevedoring* case),¹⁹ where a company supplying stevedoring services in Toronto to seven shipping companies involved in international shipping was held to be subject to federal labour legislation. The following test, formulated by Mr. Justice Estey, has become the cornerstone of subsequent judgments.

If, therefore, the work of stevedoring, as performed under the foregoing contracts, is an integral part or necessarily incidental to the effective operation of these lines of steamships, legislation in relation thereto can only be competently enacted by the Parliament of Canada.

That the work of the stevedores is an integral part would seem to follow from the fact that these lines of steamships are engaged in the transportation

of freight and the loading and unloading thereof, which would appear to be as necessary to the successful operation thereof as the enbussing and debussing of passengers in the Winner case [[1954] 4 D.L.R. 657, [1954] A.C. 541]. The loading would, therefore, be an integral part of the operation of these lines of steamships and, therefore, subject to the legislative jurisdiction of Parliament.²⁰

The same issue recently arose in *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers*,²¹ another case of disputed labour jurisdiction involving employees of a trucking company under contract to Canada Post Office to deliver and collect mail. In that case, the Supreme Court of Canada specifically adopted the test formulated by Estey J. in the *Stevedoring* case in finding the trucking operation to be integral and necessary to the delivery of mail.

On the other hand, in *Re Cannet Freight Cartage Ltd. and Teamsters Local 419*,²² the Ontario Court of Appeal held that employees loading freight onto railway cars leased from Canadian National Railway by their employer, a company affiliated with a freight shipper or forwarder engaged in the business of arranging for the shipment of freight by other carriers, were not subject to federal labour laws. In finding that the shipper was not integral to the operations of the railway, the court distinguished the facts of the case from those in the *Stevedoring* case *inter alia* on the ground that in this case the shipper employed the railway's services and was not engaged in the railway business, whereas, in the *Stevedoring* case, the shipping companies employed the stevedores who were essential to their operations.

More difficult issues of integrality have arisen in the context of three railway cases involving the connection of local branch lines to interprovincial mainlines and the use of locally owned rolling stock on interprovincial lines.

In *Luscar Collieries Ltd. v. McDonald*²³ the Privy Council dealt with the question of whether a privately owned railway branch line, which was located entirely within Alberta but which was connected to the CNR's interprovincial line, was an undertaking connecting the province of Alberta with other provinces within the meaning of paragraph 92(10)(a). Lord Warrington held that it was such an undertaking in the following terms:

It is, in their [Lordships'] view, impossible to hold as to any section of that system which does not reach the boundary of a Province that it does not connect that Province with another. If it connects with a line which itself connects with one in another Province, then it would be a link in the chain of connection, and would properly be said to connect the Province in which it is situated with other Provinces.²⁴

In coming to this decision, it is significant that the Privy Council took account of the manner in which the railway in question was operated

pursuant to a series of agreements between the parties permitting the free flow of traffic from the branch line to the interprovincial line. Indeed, the branch line was operated by the CNR pursuant to an agreement with the owner.

The Supreme Court of Canada has also followed this approach to constitutional analysis in the "*Go Train*" case,²⁵ which dealt with jurisdiction over a commuter train service operating in the Toronto-Hamilton area. The rolling stock involved was owned by the Ontario government, while the track was owned by the CNR and formed part of the CNR's national rail system. The CNR provided the crews and operated the commuter service as the agent of the Ontario government solely within the boundaries of the province.

The Supreme Court refused to concede that federal jurisdiction over interprovincial railways is limited to interprovincial services provided on such railways. In a unanimous judgment, the court held that in this case the constitutional jurisdiction depends on the character of the railway line, not on the character of a particular service provided on that line. The fact that for some purposes the commuter service could be considered as a distinct service did not make it a distinct line of railway. From a physical point of view the commuter service trains were held to be part of the overall operations of the railway line over which they run.²⁶

An earlier case which was decided differently on its facts is *City of Montreal v. Montreal Street Railway Company*.²⁷ In this case, the Privy Council denied federal jurisdiction over a Montreal tramway which was physically connected to a federally regulated railway which had in turn been declared to be a work for the general advantage of Canada under paragraph 92(10)(c). These two systems were not only connected physically, but were also operated under an agreement which permitted a flow of "through traffic" in the form of both passengers and rolling stock from one system to the other during the course of a scheduled trip.

The Privy Council held that this type of interconnection with a federally regulated carrier was not sufficient to bring the local tramway within federal jurisdiction because regulation of the local system was not "necessarily incidental" to regulation of the federal system.²⁸

This emphasis on integrality in establishing federal jurisdiction over undertakings was also important in another case, involving the Empress Hotel in Victoria which was operated by the Canadian Pacific Railway — a federally regulated undertaking operating an interprovincial railway. In *CPR v. Attorney-General of British Columbia*²⁹ the Privy Council held that the Empress Hotel was operated as a general hotel business rather than catering primarily to railway travellers. On this basis it was found to constitute a separate business or undertaking not integral to the railway undertaking. This determination by the Privy Council resulted in provincial labour laws governing the hotel operation and federal labour laws governing the railway operation.

The same principle has been applied in judicial cases dealing with various aspects of the communications industry in Canada. In *Toronto Corporation v. Bell Telephone Company of Canada*³⁰ the Privy Council dealt in the following terms with Bell's argument that its local and long distance functions constituted two separate and distinct businesses:

[T]he facts do not support the contention of the appellants. The undertaking authorized by the Act of 1880 was one single undertaking, though for certain purposes its business may be regarded as falling under different branches or heads. The undertaking of the Bell Telephone Company was no more a collection of separate and distinct businesses than the undertaking of a telegraph company which has a long-distance line combined with local business, or the undertaking of a railway company which may have a large suburban traffic and miles of a railway communicating with distant places.³¹

The functional integrity of the various technological components of a communications path has similarly been recognized by the courts in the realm of radio communication. This point was made by the Privy Council with respect to radio transmission and reception in *Re Regulation and Control of Radio Communication in Canada*:³²

The argument of the Province really depends on making, as already said, a sharp distinction between the transmitting and the receiving instrument. In their Lordships' opinion this cannot be done. Once it is conceded, as it must be, keeping in view the duties under the convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships' opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter closes. The system cannot be divided into two parts, each independent of the other.³³

This same judicial doctrine has formed the basis of federal jurisdiction over cable television undertakings. In *Re Public Service Board v. Dionne*,³⁴ the Supreme Court of Canada held that the fundamental question at issue was not whether the service involved in cable distribution was limited to intraprovincial subscribers or that it was operated by a local concern, but rather that the service consisted of the redistribution of radio broadcasting signals received "off air" by means of radio-receiving antennae.

There is another element that must be noticed, and this is that where television broadcasting and receiving is concerned there can no more be a separation for constitutional purposes between the carrier system, the physical apparatus, and the signals that are received and carried over the system than there can be between railway tracks and the transportation service provided over them or between the roads and transport vehicles and the transportation service that they provide. In all these cases, the inquiry must be as to the service that is provided and not simply as to the means through which it is carried on. Divided constitutional control of what is

functionally an interrelated system of transmitting and receiving television signals, whether directly through air waves or through intermediate cable line operations, not only invites confusion but is alien to the principle of exclusiveness of legislative authority, a principle which is as much fed by a sense of the constitution as a working and workable instrument as by a literal reading of its words.³⁵

Conclusions

It is possible to summarize the judicial tests used to establish federal jurisdiction over undertakings connecting one province with another, or extending beyond the limits of a single province, as follows:

- If an undertaking engages in a significant degree of continuous and regular interprovincial activity, it will fall within federal jurisdiction.
- If the activities of an otherwise local undertaking form an integral and necessary part of an interprovincial undertaking, that local undertaking will also fall subject to federal jurisdiction.

WORKS DECLARED TO BE FOR THE GENERAL ADVANTAGE OF CANADA

Paragraph 92(10)(c) of the *Constitution Act, 1867* provides an exception to the general principle that interprovincial undertakings are subject to federal jurisdiction and intraprovincial or local undertakings are subject to provincial jurisdiction. The provision excludes from provincial jurisdiction:

(c) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

This subsection empowers the Parliament of Canada to enact legislation bringing wholly local works within its jurisdiction.

This power has been exercised by Parliament on numerous occasions and has affected the transportation and communications sectors. For example, Bell Canada and the British Columbia Telephone Company — the two largest telephone companies in Canada — have provisions in their respective Special Acts (Acts of the Parliament of Canada, which incorporated them) declaring them to be for “the general advantage of Canada,”³⁶ as do Canada’s two largest railways, Canadian National Railway Company³⁷ and Canadian Pacific Limited.³⁸

PEACE, ORDER AND GOOD GOVERNMENT

As mentioned above, the federal government is empowered by section 91 of the *Constitution Act, 1867* “. . . to make laws for the peace,

order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the Provinces.”

This power has been interpreted by the courts as supporting exclusive jurisdiction of the Parliament of Canada over air transportation. Following the test laid down in the *Canadian Temperance* case,³⁹ the Supreme Court of Canada held in *Johannesson v. West St. Paul*⁴⁰ that aeronautics was a matter “. . . beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole.”⁴¹

The fact that federal jurisdiction over aeronautics has been supported under the “peace, order and good government” power has negated the need for any examination of the intraprovincial or interprovincial operations of particular airlines. The courts have interpreted the “national dimension” of aeronautics as justifying exclusive federal jurisdiction. In the case of *Re Orangeville Airport Ltd. and town of Caledon*⁴² the Ontario Court of Appeal reaffirmed the principles established in the *Johannesson* case and held that a municipal zoning by-law could have no application to certain airport lands upon which airplane hangars were to be constructed.⁴³

While federal jurisdiction over air transportation is now firmly established, as in the case of interprovincial undertakings, the parameters of federal jurisdiction over undertakings involved in activities related to aeronautics remain an area of dispute. For example, in *Field Aviation Co. v. The Alberta Industrial Relations Board*⁴⁴ the Appeal Division of the Supreme Court of Alberta applied the principles established in the *Stevedoring* case and held that a company engaged in the servicing of aircraft was so intimately connected with aeronautics as to constitute a work, business or undertaking within federal jurisdiction. On the other hand, porter services and limousine services have been held not to be undertakings performing activities integral to aeronautics (*Re Colonial Coach Lines*⁴⁵ and *Murray Hill Limousine Service v. Batson*⁴⁶).

OTHER HEADS OF POWER

As already mentioned, subsections 91(9), (10) and (13) of the *Constitution Act, 1867* confer exclusive jurisdiction on the federal level of government over the following heads of legislative power:

9. Beacons, Buoys, Lighthouses, and Sable Island;
10. Navigation and Shipping;
13. Ferries between a province and any British or foreign country or between two provinces.

Subsection 91(13), which confers jurisdiction over interprovincial and international ferry services on the federal government, is, in a sense,

redundant in light of the federal government's jurisdiction pursuant to paragraphs 92(10)(a) and (b) and subsection 91(29).

On the other hand, the ambit of the federal government's jurisdiction over "navigation and shipping" is tempered to some extent by provincial jurisdiction over "property and civil rights"⁴⁷ and "matters of a merely private or local nature in the province."⁴⁸

To begin with, the provinces still own the water flowing through the waterways that are made subject to federal jurisdiction. This is the case despite the fact that section 108 of the *Constitution Act, 1867* bestowed ownership of provincial public works and property connected with such waterways on the federal government in the following terms:

108. The Public Works and Property of each Province, enumerated in the Third Schedule to this Act, shall be the Property of Canada.

The third schedule then provides as follows:

The Third Schedule

Provincial Public Works and Property to be the Property of Canada.

1. Canals, with Lands and Water Power connected therewith.
2. Public Harbours.
3. Lighthouses and Piers, and Sable Island.
4. Steamboats, Dredges, and public Vessels.
5. Rivers and Lake Improvements.

In *Attorney-General of Canada v. Attorneys-General of Ontario, Quebec and Nova Scotia*⁴⁹ the Privy Council rejected the contention that ownership of the rivers themselves was transferred to the federal government but held that all improvements are federal property, whether on lakes or rivers.

As a result of their ownership of the water within the waterways, the provincial governments are permitted to legislate with respect to the use of such water for power or other purposes so long as such uses do not interfere with valid federal legislation in relation to navigable waters or navigation works (*Reference re Waters and Water-Powers*⁵⁰).

Furthermore, despite the fact that the Privy Council suggested in *Pacquet v. Pilots Corporation*⁵¹ that the heading "Navigation and Shipping" should be given a broad construction, this heading of power has not been found by the courts to justify any wider jurisdiction over undertakings engaged in shipping than is justified by virtue of paragraphs 92(10)(a) and (b). On at least two occasions the Supreme Court of Canada has ruled that subsection 91(10) does not justify an extension of federal jurisdiction where inland or intraprovincial shipping are involved (*Agence Maritime Inc. v. Canada Labour Relations Board*,⁵² and *Reference re: Industrial Relations and Disputes Investigation Act*⁵³).

The effect of the case law is that while the federal government owns and controls the improvements required to operate a water transporta-

tion system, and has the constitutional jurisdiction to regulate interprovincial and international undertakings engaged in water transportation, the provinces may regulate the use of the water within the rivers and lakes and may regulate the activities of intraprovincial or local undertakings engaged in the provision of water transport services to the extent that such regulation does not interfere with the federal government's activities in regard to navigation and shipping.

The Regulatory Framework

Having reviewed the judicial interpretation of the principal sections of the *Constitution Act, 1867* relating to the division of legislative powers in relation to transportation and communications, the current regulatory framework applicable to these two industrial sectors will now be examined. As might be expected from the foregoing analysis of the constitutional framework, the division of legislative and regulatory powers between the two levels of government varies significantly depending on the constitutional basis of jurisdiction relied on and the application of judicial doctrines of interpretation. For this reason, it is necessary to consider in turn jurisdiction over the various modes of transportation and communication.

TRANSPORTATION

For the purpose of this analysis, consideration of the transportation sector is divided into six principal modes of transport: shipping, aeronautics, railways, motor vehicle transportation, commodity pipelines and electrical transmission.

Shipping

The federal government's jurisdiction over "navigation and shipping" is exercised pursuant to a web of legislation that includes the *Navigable Waters Protection Act*,⁵⁴ the *National Harbours Board Act*,⁵⁵ the *Canada Shipping Act*,⁵⁶ the *National Transportation Act*,⁵⁷ the *Pilotage Act*,⁵⁸ the *Shipping Conferences Exemption Act, 1979*,⁵⁹ the *St. Lawrence Seaway Authority Act*⁶⁰ and the *Transport Act*.⁶¹ In addition to regulating the registration of vessels, pilotage, the use of harbours and other navigable waterways, and shipping rates, federal statutes of general application such as the *Canadian Labour Code*⁶² apply to interprovincial and international shipping undertakings. Intraprovincial or local shipping falls within the ambit of provincial legislative and regulatory jurisdiction. This regulatory scheme is consistent with judicial interpretation of the division of powers between the two levels of government.

Aeronautics

As mentioned above⁶³ in the discussion of the constitutional framework, federal jurisdiction over aeronautics is based on Parliament's power to make laws for the "peace, order and good government" of Canada.

The federal government regulates aeronautics pursuant to the *Aeronautics Act*⁶⁴ and the *National Transportation Act*⁶⁵ as well as certain other legislation which implements Canada's international treaty obligations in the realm of air transportation.

Consistent with judicial interpretation of the federal government's exclusive jurisdiction in this field, all air carriers, including local or intraprovincial undertakings, are federally regulated as are all other activities considered integral and necessarily incidental to aeronautics.

Railways

Canada's two principal railways, Canadian National Railways and Canadian Pacific Limited, have both been declared "works or undertakings for the general advantage of Canada" and hence fall subject to federal jurisdiction.⁶⁶ They are regulated by the Rail Transport Committee of the Canadian Transport Commission pursuant to the provisions of the *National Transportation Act*, the *Railway Act*⁶⁷ and their own Special Acts of incorporation enacted by the Parliament of Canada.⁶⁸ Other federal statutes are applicable to specific aspects of railway regulation such as the *Maritime Freight Rates Act*,⁶⁹ the *Railway Relocation and Crossing Act*⁷⁰ and the *Western Grain Transportation Act*.⁷¹ Other interprovincial railway undertakings are similarly regulated at the federal level while local or intraprovincial railways are provincially regulated.

In this regard, it should be recalled that undertakings whose activities are integral to the operation of an interprovincial rail undertaking, or whose facilities form an integral part of an interprovincial rail undertaking, fall subject to federal jurisdiction regardless of whether they in fact operate extraprovincially or whether their physical facilities cross any provincial border.⁷²

This division of jurisdiction is again consistent with judicial interpretation of the *Constitution Act, 1867*.

Motor Vehicle Transportation

As mentioned in the discussion of the constitutional framework,⁷³ the *Winner* case, the *Tank Truck Transport* case and the *Liquid Cargo Lines* case established that undertakings engaged in the provision of interprovincial services on a regular basis fall subject to federal jurisdiction regardless of whether the bulk of their business is carried on within a single province. The case law therefore points to split jurisdiction over road transportation undertakings depending on the local, interprovincial or international nature of their routes.

In practice, this regulatory dichotomy over motor vehicle transporta-

tion has been altered through legislative initiatives and cooperation between the federal and provincial levels of government.

Following the decision of the Privy Council in the *Winner* case the federal government enacted the *Motor Vehicle Transport Act*.⁷⁴ This legislation effectively delegates the regulation of extraprovincial undertakings to provincial boards established pursuant to provincial motor vehicle transportation legislation. *The Motor Vehicle Transport Act* not only delegates the interprovincial licensing function to provincially appointed boards, but also the regulation of tolls and the determination of the terms and conditions of operation of the undertaking.⁷⁵

The constitutional validity of this delegation legislation was upheld by the Supreme Court of Canada in *Coughlin v. Ontario Highway Transport Board*⁷⁶ despite the fact that the same court had held in the earlier *Nova Scotia Interdelegation*⁷⁷ case that the direct delegation of statutory powers from one level of government to another was unconstitutional. The court in the *Coughlin* case distinguished the regime proposed under the *Motor Vehicle Transport Act* from the intergovernmental delegation of legislative powers, stating that the federal legislation did not amount to an abdication of constitutional power but rather the adoption of such legislation of another level of government as may from time to time exist.⁷⁸ This mode of delegation therefore creates a practical deviation from the constitutional framework envisaged in the *Constitution Act, 1867* and effectively eliminates much of the dual regulation that would otherwise exist in this transportation sector.

Notwithstanding the foregoing, a dual level of regulation still exists in regard to certain aspects of motor vehicle transportation. For example, the transfer of ownership of an interprovincial motor vehicle undertaking is not effective unless the procedures set forth in section 27 of the *National Transportation Act* are complied with. This provision requires public notice of the pending acquisition to be given and empowers the Canadian Transport Commission to determine whether or not the acquisition should be permitted in cases where a member of the public has objected to the transfer. In those cases the commission must determine whether the transfer "will unduly restrict competition or otherwise be prejudicial to the public interest."⁷⁹

At the same time, provincial legislation may also require the approval of the provincial regulator before a transfer of ownership is permitted to take effect. In Ontario, for example, the board is required to determine "whether or not the public necessity and convenience served by the transportation service carried on under the licence will be prejudiced by the transfer of the licence."⁸⁰

Technically, therefore, a motor vehicle carrier operating an interprovincial undertaking must obtain the approval of the federal and at least two provincial regulatory bodies before a transfer of ownership may be proceeded with. In practice, however, there has been little conflict between the two levels of government on such matters.

Commodity Pipelines

As in the case of other works and undertakings involved in the provision of transportation services, commodity pipelines are subject to provincial jurisdiction when restricted in location and operation to a single province, and are subject to federal jurisdiction when they extend beyond the boundaries of a single province or are interconnected with an interprovincial or international pipeline system. (*Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans-Mountain Pipe Line Co.*⁸¹)

The federal government exercises its jurisdiction over interprovincial and international gas and oil pipelines pursuant to the provisions of the *National Energy Board Act*.⁸² Other interprovincial commodity pipelines are regulated pursuant to the provisions of the *National Transportation Act*. Local or intraprovincial pipelines are regulated by the provinces.

Electrical Transmission

A different regime governs the transmission facilities used to conduct electricity from one province to another or internationally from Canada.

The construction and operation of international power lines is regulated by the federal level of government pursuant to the provisions of the *National Energy Board Act*.⁸³ This is consistent with the judicial interpretation of the constitution in cases such as *British Columbia Power Corp. Ltd. v. A.-G. of British Columbia*.⁸⁴

The construction and operation of interprovincial power lines, on the other hand, has historically been regulated at the provincial level. Although section 90.1 of the *National Energy Board Act* empowers the Governor in Council to designate any such facility as subject to the provisions governing international power lines, this power has never been invoked. The Supreme Court of Canada has held that absent superseding federal legislation, provincial regulatory agencies may validly entertain applications for the construction and border connection of provincial power lines with other such facilities located in adjacent provinces, if the province does not purport to regulate the border interconnection.⁸⁵

COMMUNICATIONS

As in the case of transportation, different modes of communications are subject to federal or provincial constitutional jurisdiction depending on whether they are provided by interprovincial or intraprovincial undertakings and depending on whether they are considered to be of such importance or to contain such a national dimension as to justify exclusive federal jurisdiction. Since jurisdiction over radio communication has been well defined by the courts, it is useful to consider this mode of communication before considering jurisdiction over others.

Radio Communication

In the leading case of *In re Regulation and Control of Radio Communication in Canada* the Privy Council decided that the power to legislate with respect to broadcasting fell within the exclusive jurisdiction of the federal level of government.⁸⁶ The first basis for this decision was the need for the federal government to implement its international treaty obligations in respect of radio communication. The Privy Council held that the power of the federal government to legislate with respect to the peace, order and good government of Canada supported this basis of jurisdiction over radio communication.⁸⁷ Furthermore, the Privy Council suggested that, as in the case of aeronautics, the whole subject of radio communication, involving as it does the regulation of radio frequencies which know no political boundaries, is so completely covered by international agreements that there is not enough remaining latitude to confer a separate field of jurisdiction on the provinces.⁸⁸

The Privy Council went on to hold that, in any event, broadcasting falls within the definition of "telegraphs" in paragraph 92(1)(a) of the *Constitution Act, 1867* as well as the general concept of an interprovincial undertaking.⁸⁹ In making this ruling, the Privy Council found a functional relationship to exist between the equipment used to transmit radio signals and the equipment used to receive such signals — each being useless without the other.⁹⁰ This perceived integrality of the system coupled with the inability to contain radio signals within political boundaries, led the Privy Council to conclude that jurisdiction over radio communication resided solely with the federal level of government.

In subsequent cases, both the general power of the federal government to legislate with respect to the peace, order and good government of Canada and its jurisdiction over interprovincial undertakings, have been used by the courts to justify exclusive federal jurisdiction over radio communication. Since radio communication is used in a variety of modes of communication, including radio and television broadcasting, microwave transmission and satellite transmission, the extent of federal jurisdiction emanating from jurisdiction over radio communication is very extensive. Indeed, the reasoning in the *Radio Reference* has subsequently been applied to cable television distribution undertakings which receive television and radio signals "off air" and redistribute them to the public via coaxial cable networks. In *Capital Cities Communications Inc. v. Canadian Radio-television and Telecommunications Commission*⁹¹ the Supreme Court of Canada approved an earlier ruling by the British Columbia Court of Appeal⁹² that the cable distribution system was nothing more or less than an integral part of the receiving facilities used to pick up the radio signals and as such fell under exclusive federal jurisdiction.

Federal jurisdiction over radio communication is not restricted to the facilities and frequencies used to provide radio services. It has also been

held to extend to regulation of the intellectual content of the transmission. In *Re CFRB*⁹³ the Ontario Court of Appeal made this determination in upholding a provision in the federal *Broadcasting Act*⁹⁴ regulating the transmission of partisan political programming immediately prior to federal, provincial or municipal elections. The court ruled that it would be illogical to divide legislative control over the transmission system and the message carried by such a system.⁹⁵

However, federal jurisdiction over the content of radio communication is not exclusive. In *Attorney-General of Quebec v. Kellogg's Company of Canada*⁹⁶ the Supreme Court of Canada upheld provincial legislation enacted by Quebec which prohibited the use of cartoons in children's advertising. The court held that this legislation constituted a valid exercise of the province's power to legislate with respect to "property and civil rights in the province" and "generally all matters of a merely local or private nature in the province"⁹⁷ (subsections 92(13) and (16) of the *Constitution Act, 1867*). Having made this initial determination, the court distinguished the facts of this case from the *CFRB* case on the basis that no attempt had been made by the Quebec government to regulate a broadcasting undertaking — only an advertiser. The court held that this did not constitute an interference with federal power to regulate broadcasting undertakings. Furthermore, the court noted that although the federal regulator was empowered to make regulations respecting the "character of advertising" used in radio and television broadcasting, this power had not in fact been exercised at the date of the *Kellogg's* case.⁹⁸

In practice, undertakings involved in the provision of radio communication are regulated by the federal level of government. The Canadian Radio-television and Telecommunications Commission (CRTC) licenses television, radio and cable television undertakings pursuant to the provisions of the *CRTC Act*⁹⁹ and the *Broadcasting Act* and regulates most aspects of their activities. The Department of Communications licenses the use of radio frequencies and regulates the technical aspects of radio facilities used in broadcasting, cable distribution and other forms of radio communication pursuant to the provisions of the *Radio Act*.¹⁰⁰

Telephones

Unlike the radio and television broadcasting fields, there has been a surprising lack of judicial involvement in determining the division of jurisdiction over telephone service in Canada.

In Canada, no single undertaking has the facilities to provide a complete telephone service to the public in all regions of the country. In fact, with the exception of Bell Canada which provides service to most of Quebec and Ontario, no single public telephone company can provide service on its own facilities between points within more than one province.

The provision of such services in practice involves the use of facilities owned by one or more other telephone companies and, in some cases, the use of satellite facilities owned by Telesat Canada. The use of these other facilities necessary to complete interprovincial communications is facilitated by a web of connecting agreements which effectively link Canada's telephone systems together. Such agreements usually provide for a revenue settlement plan and technical connection arrangements designed to ensure the compatibility of systems.

The systems of Canada's nine major telephone companies are linked together pursuant to the Telecom Canada connecting agreement. This agreement, which covers telephone communications between non-adjacent provinces, is more complex than other connecting agreements in that it covers transmission by cable, microwave and satellite and provides for the establishment and operation of an organization known as Telecom Canada (formerly the Trans-Canada Telephone System) which is run by a board of management. Telecom Canada is responsible for the organization and operation of interprovincial telephone service involving all ten of its member companies. A substantial staff is maintained at headquarters located in Ottawa.

It is the responsibility of each member of Telecom Canada to ensure that its system is connected with other telephone companies within its geographic area pursuant to individual connecting agreements and to enter into connecting agreements with adjacent members. In this way the disparate parts of Canada's telephone system are joined.

Again, with the exception of calls between Quebec and Ontario on Bell Canada's system, no interprovincial public telephone communication can be provided without using the equipment of more than one telephone company regardless of whether the transmission is made by cable, microwave or satellite. All such communications must travel from an individual telephone set through local lines to a local exchange and then on to a long-distance exchange for interprovincial routing. The reverse routine is followed at the receiving end using the facilities of a different telephone company in a different province. The same telephone sets, local lines, local exchanges and even long-distance exchanges are utilized for the provision of local services within a given province. Such equipment forms an integral part of the facilities used to provide both types of service. Similarly, most telephone company employees are involved in the operation of both types of services. This situation obtains even in the case of small telephone companies utilizing only a few exchanges. An interprovincial or an intraprovincial telephone communication cannot be completed to a subscriber of such a company without the use of its facilities and personnel.

In addition to using the traditional hard wire connections to complete telephone connections, the members of Telecom Canada operate a national microwave system which forms an integral part of their long-

distance facilities for the provision of both intraprovincial and interprovincial long-distance communications. As mentioned above, this microwave system has been augmented by satellite transmission services furnished by Telesat Canada — the latest full member of Telecom Canada.

The high degree of facility integration involved in providing interprovincial telephone communications, the physical connection of systems in adjacent provinces, the use of radio communication to provide certain intraprovincial and interprovincial telephone communications, the undoubted importance of telephone service to the nation, and the inability of any single telephone system to provide interprovincial communications to different regions of the country without connection to and cooperation from a system in another province, all point to exclusive federal jurisdiction over telephone systems and service in Canada on the basis of the constitutional doctrines previously outlined in the opening section.

On the basis of the transportation cases relating to the trucking and rail industries, a strong argument can be made that the functional integration of the telephone companies into a single interprovincial system, coupled with the detailed connection arrangements and revenue settlement plans administered by Telecom Canada, render all participants in the system interprovincial undertakings. Indeed, as previously indicated,¹⁰¹ in one of the few cases touching on this issue, the Privy Council held in *Toronto Corporation v. Bell Telephone Company of Canada* that Bell's local service could not be separated from its long-distance service for the purpose of establishing jurisdiction over the company — many of the same facilities being used by Bell to provide its local and long-distance telephone services.¹⁰²

In addition to this possible head of federal jurisdiction based on paragraphs 92(10)(a) and (b) of the *Constitution Act, 1867*, it is not difficult to draw analogies to the reasoning employed in both the *Radio Reference* and the *Aeronautics* cases, to conclude that telecommunications is "... a class of subject which has attained such dimensions as to affect the body policy of the Dominion."

However, notwithstanding the fact that judicial interpretation of the Constitution provides a basis for exclusive federal jurisdiction over all interconnected telephone systems in Canada, the practical regulation of the telephone industry has historically deviated from this constitutional framework. Despite the degree to which the various telecommunications carriers are interconnected, both physically and administratively through connecting agreements, revenue settlement plans and technical agreements, the federal government has yet to assert a claim to exclusive jurisdiction over all interprovincial telephone services or over the interconnected facilities used to furnish such services. Furthermore, this jurisdictional issue has yet to be finally determined by the courts.

What remains is a patchwork of federal and provincial regulatory bodies asserting a divided, mutually exclusive jurisdiction over the various telecommunications carriers.

The CRTC acquired regulatory jurisdiction over the federal telecommunications carriers from its predecessor, the Canadian Transport Commission, following enactment of the *Canadian Radio-television and Telecommunications Commission Act*¹⁰³ in 1976.

Bell Canada, which serves most of Quebec and Ontario and part of the Northwest Territories, and the British Columbia Telephone Company (B.C.Tel), which serves most of British Columbia (and which is controlled by GTE (General Telephone and Electronics), thereby making it the only major telephone company in Canada that is foreign-controlled), fall under CRTC jurisdiction by virtue of provisions in their respective Special Acts (Acts of the Parliament of Canada, which incorporated them) declaring them to be for "the general advantage of Canada."¹⁰⁴ CRTC jurisdiction also extends to NorthwesTel and Terra Nova Tel, subsidiaries of Canadian National Railways, by virtue of section 16 of the *Canadian National Railway Act*.¹⁰⁵ These companies provide telephone service to Yukon and part of the Northwest Territories and to parts of Newfoundland, respectively.

Telesat Canada, which was incorporated by Parliament¹⁰⁶ to provide a domestic satellite service, and CNCP Telecommunications, which is a partnership between two companies each of which was incorporated by Parliament and made expressly subject to the provisions of the *Railway Act* by statute,¹⁰⁷ are also interprovincial undertakings which fall subject to CRTC jurisdiction.

The federally regulated telecommunications carriers, including Bell Canada, B.C.Tel, Telesat and CNCP, together supply more than 75 per cent of telecommunications services in Canada.¹⁰⁸

The other carrier under federal jurisdiction is Teleglobe Canada,¹⁰⁹ a federal Crown Corporation which reports its rates to the minister of communications rather than to the CRTC and which is not regulated in the same way as the other carriers.

The remaining telephone companies have historically fallen subject to provincial jurisdiction. Alberta Government Telephones (AGT), which services most of Alberta outside of Metropolitan Edmonton, is the largest provincially regulated telephone company. Provincial legislation provides in most cases for regulation by provincial public utility boards or commissions, although some provincial legislation permits the municipal regulation of local telephone companies. The largest municipally regulated system in Canada is "edmonton telephones."¹¹⁰

Telecom Canada is not regulated by the CRTC as an entity apart from its members. The ten member companies are currently regulated by eight different regulatory bodies, as indicated in Table 3-1.

When the members of Telecom Canada decide on increases in long-

TABLE 3-1 TransCanada Telephone System (TCTS)

Company	Ownership	Regulatory Body
AGT (Alberta Government Telephones)	Provincial Crown Corporation	Public Utilities Board of Alberta
B.C.Tel	Investor-owned	CRTC
Bell Canada	Investor-owned	CRTC
Island Tel, P.E.I.	Investor-owned	Public Utilities Commission of P.E.I.
Manitoba Telephone System	Provincial Crown Corporation	Public Utilities Board of Manitoba
Maritime Tel & Tel	Investor-owned	Board of Commissioners of Public Utilities of Nova Scotia
New Brunswick Tel	Investor-owned	Board of Commissioners of Public Utilities of New Brunswick
Newfoundland Telephone	Investor-owned	Board of Commissioners of Public Utilities of Newfoundland
SASK TEL (Saskatchewan Telecommunications)	Provincial Crown Corporation	Public Utility Review Commission
Telesat Canada Canada	Government of Canada	CRTC

Source: Submission of the TCTS in response to the discussion paper of the Parliamentary Task Force on Regulatory Reform, September 1980.

distance interprovincial rates, each member company files the rate schedule with its respective regulatory authority either for approval or for information purposes depending on what the regulator requires. Since Telecom Canada has historically maintained rates of uniform application across Canada, regulatory bodies have tended to accept these rates without close examination. This has produced a regulatory void with which the various regulatory authorities have been reluctant to tamper.

This regulatory impasse came to a head in 1978 after Bell Canada and B.C.Tel filed applications with the CRTC for changes in their Telecom Canada rates. After an extensive review of the Revenue Settlement Plan under which the Telecom Canada members divide the revenues and expenses associated with the provision of their services, the CRTC ordered Bell Canada and B.C.Tel to negotiate certain changes in the Telecom Canada Connecting Agreement and Revenue Settlement Plan.¹¹¹ This decision was the subject of a joint appeal to the cabinet by all of the Telecom Canada members — an appeal which was denied in this respect by the cabinet.¹¹² However, notwithstanding the CRTC's

review of the Telecom Canada rates proposed by the two federally regulated members, Telecom Canada still remains unregulated as an entity.

Finally the employment of radio communication in the provision of microwave, satellite, mobile radio and radio paging services by telephone companies is subject to the licensing authority of the minister of communications under the *Radio Act*. This basis of jurisdiction has recently been exercised by the minister of communications to license both telephone companies and a competing system for the provision of cellular mobile radio service. As discussed further below, the minister has for the first time used this exclusive federal jurisdiction over radio communication to regulate indirectly the activities of provincially regulated telephone companies in this new communications field.

Although the exercise of federal jurisdiction has in the past been limited as described above, litigation is currently before the Federal Court of Appeal which could either alter the status quo or lead to changes in the existing jurisdictional framework.

This litigation resulted from an application by Alberta Government Telephones (AGT) for a writ of prohibition to prevent the CRTC from proceeding with an application made by CNCP Telecommunications for systems interconnection with AGT. As a telephone company which had hitherto been provincially regulated, AGT argued that the CRTC lacked jurisdiction to deal with CNCP's application first, because AGT is a local undertaking and, secondly, because AGT is an agent of the provincial Crown.

After reviewing the constitutional facts which established the nature of AGT's physical network, the services provided by it and its involvement in Telecom Canada, the Federal Court, Trial Division concluded that AGT is not a local undertaking and that its facilities and operations are integral to and interdependent with a larger undertaking operated by the Telecom Canada membership on an interprovincial basis.¹¹³

However, notwithstanding the court's decision on the constitutional jurisdiction issue, the court held that the CRTC lacks statutory jurisdiction over AGT since AGT is an agent of the provincial Crown, and the relevant provisions of the *Railway Act* neither expressly nor by implication bind the Crown.¹¹⁴ The decision reached in this case on the Crown immunity issue is similar to that reached by the Supreme Court of Canada in the earlier case of *The Queen in Right of Alberta v. Canadian Transport Commission*.¹¹⁵ In that case, the Supreme Court held that the government of Alberta was not bound by the provisions of the Air Carrier Regulations to notify the Canadian Transport Commission and seek the commission's approval of its acquisition of control of Pacific Western Airlines Ltd. As in the AGT case, the Supreme Court's decision turned in large measure on its interpretation of section 16 of the *Interpretation Act*¹¹⁶ which provides as follows:

No enactment is binding on Her Majesty or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to.

While the impediment of Crown immunity to the exercise of constitutional jurisdiction may be negated by amending the applicable legislation to expressly apply to the Crown, as was done following the *Pacific Western* case,¹¹⁷ the application of this doctrine in fields of commercial activity can serve to impede the orderly regulation of an industry. In the AGT case, Madame Justice Reed questioned the rationale behind this application of the doctrine:

As a canon of statutory interpretation, there is really no reason to suppose that the omission in a federal statute of a section expressly binding the Crown provincial is always the product of a conscious decision by Parliament that the provincial Crown should not be bound. More likely it is the failure of anybody to consider the question (this immunity can have serious consequences when a commercial activity, for example, such as investment in securities and other financial instruments, is carried on by a provincial government agency). If the immunity were only applicable to what might be called governmental activities, its rationale would become clear — to prevent one level of government effectively subordinating the other. But when the immunity is carried also by a government business or commercial agency, especially one in which competing private enterprises are subject to government regulation, the rationale is a bit more difficult to understand.¹¹⁸

Telegraph

Telegraphs are specifically mentioned in paragraph 92(10)(a) of the *Constitution Act, 1867* and fall subject to federal or provincial jurisdiction depending on whether they are interprovincial or intraprovincial undertakings.

With the evolution of newer forms of technology, telegraph service in its traditional form has diminished in importance to a degree where CNCP telecommunications provides the only national telegraph service. CNCP is federally regulated pursuant to the provisions of the *Railway Act*, the *CRTC Act*, the *National Transportation Act* and the *Telegraphs Act*.¹¹⁹

Conclusions

As might be expected from the preceding analysis, superimposing the Canadian constitutional framework on the transportation and communications sectors has resulted in a patchwork of provincial and federal regulatory jurisdictions.

In the transportation sector, with the exceptions of aeronautics and water navigation, the division of jurisdiction based on the distinction between interprovincial and intraprovincial undertakings has spawned a

great deal of litigation and has led to a number of fairly technical judicial doctrines of interpretation. While these doctrines have for the most part subjected interprovincial undertakings to federal jurisdiction and intra-provincial undertakings to provincial jurisdiction, they have not permitted a single level of government to regulate the industry as a whole. Consequently, in all areas of transportation except aeronautics, intra-provincial undertakings are regulated by ten different provincial regulatory bodies, and interprovincial undertakings are regulated at the federal level.

In the trucking sector, the federal government's lack of interest in regulating interprovincial undertakings led to its delegation of this power to provincial regulatory bodies — thereby legally circumventing the divided jurisdiction dictated by the constitution — but leaving interprovincial trucking operations subject to different regulation in all ten provinces.

In the aeronautics sector, the courts' interpretation of the general power of the federal government to legislate with respect to the ". . . peace, order and good government of Canada" has led to exclusive federal jurisdiction in the area, enabling a single level of government to regulate the development of a national system of air services.

In the communications sector, a distinction must be drawn between radio and telephone communication. The courts' emphasis on the functional integrality of radio transmitters and receivers, the inability of radio signals to be contained within political boundaries as well as the federal government's general power have all led to exclusive federal jurisdiction over radio and television broadcasting and distribution.

The wide ambit of this exclusive federal jurisdiction over broadcasting, which has been held to include content regulation, has led to both legal and political disputes between the provincial and federal levels of government. At the legal level, the courts have held that the federal government may regulate the content of material carried by broadcasting undertakings and that the provincial governments may regulate the content of advertising material submitted by advertisers to those same broadcasting undertakings. These judicial decisions have not settled the political issue of content regulation.

Similarly, the provinces continue to dispute federal jurisdiction over cable distribution undertakings and, more recently, have questioned the federal assertion of jurisdiction over pay television content and carriage.

In the telephone industry, regulation has historically evolved along lines that deviate from what the constitutional doctrines would dictate. As outlined above, there is a patchwork of regulation by the federal government and all ten provinces, with the country's two largest telephone companies being federally regulated and most of the remaining telephone companies provincially regulated. There is currently no split jurisdiction over the interprovincial and intraprovincial aspects of telephone service, and Telecom Canada has gone unregulated as an entity.

This situation has remained unchanged over time partly because the federal government has not tried to extend its jurisdiction and partly because of a lack of challenge in the courts. This situation is, however, in a state of flux. The Federal Court of Canada currently has before it a case which raises the issue of federal regulatory jurisdiction over Alberta Government Telephones, a telephone company which historically has been regulated at the provincial level.

The Canadian Economic Union

This section of the study begins with a brief consideration of the concept of economic union. The constitutional and regulatory treatment of certain elements of the Canadian transportation and communications sectors will then be reviewed in light of these underlying principles, and current impediments to the creation of an economic union in these sectors will be identified.

Economic Union

The concept of an economic union was defined in the following terms by the federal government of Canada in a discussion paper entitled "Securing the Canadian Economic Union in the Constitution"¹²⁰ which was presented to the Continuing Committee of Ministers on the Constitution in July 1980:

An economic union is an entity within which goods, services, labour, capital and enterprise can move freely, that is, without being subject to fiscal and other institutional barriers, and which is endowed with institutions capable of harmonizing the broad internal policies which affect economic development and of implementing common policies with regard to the entity's external relations.¹²¹

There are two central elements in this definition which combine to form the concept of an economic union: one is the establishment of a common market within which both capital and labour are permitted to move freely; the other is the coordination and harmonization of the economic policies of the entity as a whole both internally and externally in its dealings with other entities.

The establishment of a common market entails, as between the constituent elements of the federation or the states in the economic union, the elimination of customs duties and of quantitative restrictions on the import and export of goods and services, the abolition of obstacles to the free movement of labour, services and capital, and the implementation of other equivalent measures designed both to break down existing barriers to the creation of a single market economy and to provide participants in this market with positive economic rights.

In addition to these substantive legal measures, an economic union requires the guidance of a single economic strategy in key sectors if the goals of industrial rationalization and economic development are to be achieved and if the market structure is to avoid fragmentation. In many cases, this involves the harmonization and integration of laws and policies in the constituent elements of the union and is facilitated by the creation of institutions endowed with the legal capacity to formulate and implement such common policies.

The Transportation and Communications Sectors

The transportation and communications industries in Canada have, in general, been subjected to a high degree of regulation. In transportation, this has entailed extensive regulation of market entry, carrier routes and rates in many sectors of the industry. In telecommunications, a regulated monopoly environment has evolved with the operations of the telephone companies, for example, being confined to well-defined mutually exclusive geographic boundaries. These same telephone companies are subject to detailed rate base regulation. Market entry and competition have consequently been limited and, where competitive forces have been permitted to operate, their effect has in general been tempered by regulatory safeguards.

While the development of an economic union in Canada has been facilitated by the existence of competitive market conditions in certain sectors of the economy, the pervasive regulation that currently characterizes the transportation and communications industries does not in itself necessarily present a barrier to the attainment of such a union. Indeed, the sanctioning of a monopoly environment in various sectors of transportation and communications has had its roots in the regulators' belief that the goal of developing an adequate transportation and communications system, accessible to the public at reasonable rates, could best be attained under monopoly conditions. It is only recently, with the maturing of these industries that underlying economic percepts are being re-examined by the legislators and regulators and that the value of introducing competition as a means of encouraging efficiency and innovation is being reassessed.

However, while regulation does not in itself impede the development of an economic union in transportation and communications in Canada, the lack of any unified legislative and regulatory jurisdiction over certain aspects of these two sectors does hamper this development. In the remainder of this section specific aspects of the transportation and communications sectors will be analyzed with a view to identifying the differing impact that unified and divided federal and provincial regulatory jurisdictions have had on the development of Canadian economic union in transportation and communications.

TRANSPORTATION

As indicated in the first section of the study, the federal government is endowed constitutionally with considerable power to regulate the development of the transportation industry in Canada. Exclusive federal jurisdiction over interprovincial and international transportation undertakings and over all aspects of aeronautics provides Parliament with significant capability to promote the development of a transportation infrastructure to facilitate the free movement of goods and persons in Canada.

However, as mentioned, Parliament has not always chosen to exercise its authority in the transportation sector to promote a uniform transportation policy and to harmonize the laws and regulations affecting undertakings. In this regard, Parliament's delegation of regulatory authority to provincial regulatory tribunals in the case of the trucking industry provides a useful contrast with its full exercise of jurisdictional powers in the case of the aeronautics industry.

Trucking

In the trucking industry the federal government has delegated to provincial boards the power to license and regulate interprovincial motor vehicle undertakings, retaining for itself only a limited regulatory jurisdiction over transfers of ownership, safety standards and labour matters.¹²² The result of this delegation is that all ten provinces have authority to regulate the operation of motor vehicle carriers within their boundaries as well as the operation of interprovincial routes connecting one province with another. As noted in the federal government's discussion paper presented to the Constitutional Conference in August 1980, there are now ten sets of regulations regarding entry and exit, provision of service, conditions of carriage, rates and level of consumer protection in the trucking industry. Five provinces (Newfoundland, Prince Edward Island, Quebec, Manitoba and Saskatchewan) control both entry and the level of rates. Alberta does not control entry or the rates of intraprovincial carriers. However, extraprovincial carriers can only operate in Alberta with a licence which is issued to non-residents on a different basis than for residents. The remaining provinces control entry but not rates.¹²³

Not only has delegation of the federal government's power to regulate interprovincial motor carriers created the opportunity for disparate provincial transport policies to come to bear on a single industry, making compliance for national or interprovincial carriers difficult — but the number or complexity of so many sets of different regulations must necessarily act as a deterrent to the rationalization of the industry and add to the administrative burden on interprovincial carriers, thereby having a negative impact on efficiency.

To the extent that this web of regulations impedes the ability of interprovincial motor carriers from operating in an efficient manner or discourages further rationalization of the industry, the situation presents an impediment to the free movement of goods in Canada and a barrier to the development of a common market with a common transportation policy.

Railways

The federal government's jurisdiction over the two principal railways has led to pervasive federal jurisdiction in the field of rail transportation. This authority has been augmented by the application of the doctrine of integrality which has resulted in many local and regional rail services and facilities being brought under federal jurisdiction. This situation historically fostered the development of a comprehensive rail system in Canada.

These principles will again be challenged as the provincial governments assert renewed interest in the development of short-line railways to service resource bases. Depending on the scope of operation, the degree of Crown ownership and on the national importance of such transportation links, jurisdictional disputes over their regulation may again be expected to surface and the possibility of two-tier regulation may again arise.

Aeronautics

In the field of air passenger transport, on the other hand, extensive regulatory authority is exerted by a single level of government. Aeronautics falls within the exclusive jurisdiction of the federal level of government whether intraprovincial, interprovincial or international carriers are involved. A single regulatory body, the Air Transport Committee of the Canadian Transport Commission (CTC), and a single federal government department, the Department of Transport, are charged with regulating the industry. In the exercise of this jurisdiction, the degree of regulation imposed on all facets of the air passenger industry has been such that market forces have historically been given little room to operate. Entry has been controlled, fares have been subject to approval, routes have been allocated, and route and service restrictions have been imposed on carriers' licences.

The early history of air carrier regulation in Canada reveals a concerted effort on the part of the federal government to restrict route competition in the industry in the interests of promoting a stable and comprehensive transportation infrastructure in the country. For many years, for example, CP Air was restricted from competing with Air Canada on trans-Canada routes. It was not until 1959 that Air Canada's monopoly on this route was broken and CP Air was permitted to offer a single round trip daily between Montreal and Vancouver. Since 1959,

these restrictions have been relaxed in stages until in 1979 all capacity restrictions on CP Air were finally removed. Since 1979, Air Canada and CP Air have enjoyed a duopoly over the provision of regularly scheduled trans-Canada passenger service.¹²⁴

Once it allowed CP Air to compete with Air Canada on certain specified transcontinental routes, the federal government pursued a policy of limiting competition between the two "national carriers" (Air Canada and Canadian Pacific) and the four principal "regional carriers" (Western Pacific, Nordair, Quebec Air and Eastern Provincial Airlines) on the one hand, and between those regional carriers and a third level of local carriers on the other. These levels or tiers of carriers and the rights and obligations of each were developed through the licensing decisions of the CTC.

In the past few years the federal government has taken a number of steps to increase the level of competition on certain domestic air routes and to reduce the level of industry regulation.

In 1981 the minister of transport released a regulatory proposal entitled "Proposed Domestic Air Carrier Policy (Unit Toll)"¹²⁵ which attempted to freeze the relationship between the carriers in the form of a government policy. The minister proposed to fix the number of national and regional carriers at their existing levels, restrict the four regional carriers to routes within one of two zones — thereby preventing full competition on trans-Canadian routes — and limit the ability of third level carriers to become regionals by preventing them from acquiring jet aircraft for passenger carriage and by requiring them to add more intermediate stops between destinations served by national or regional carriers. It was proposed that CTC approval continue to be required on all applications for new routes or services.

These proposals were subjected to extensive public scrutiny in hearings before the House of Commons Standing Committee on Transport. In its report, which was released on April 6, 1982,¹²⁶ the standing committee rejected calls made by some intervenors, including the Economic Council of Canada,¹²⁷ for the deregulation of the airline industry and endorsed the continued regulation of the industry pursuant to a set of policy guidelines which it hoped would foster the continued evolutionary process toward greater, but controlled, competition.

While the standing committee did not endorse the deregulation of the industry, neither did it accept the rigid restrictions on operation that the minister had proposed. Therefore, although the standing committee recommended that only the two existing national carriers should be permitted to provide service on trans-Canadian routes below 60 degrees north latitude, it also recommended that any carrier, whether national, regional or local should be permitted to apply to serve routes between city-pairs up to 1,500 miles apart in southern Canada or any route in northern Canada. The standing committee rejected the imposition of

restrictions on aircraft type or size for any level of carrier and recommended that the CTC define a zone of flexibility within which carriers would be allowed to vary their fares upon providing the CTC with advance notice.

In making its recommendations, the standing committee stated that the domestic air carrier policy should promote the following five objectives:

- (1) Increased efficiency of the air transportation system;
- (2) Improved passenger convenience;
- (3) The provision of an adequate choice of air services and fares;
- (4) The long term financial viability of the industry; and
- (5) Adequate and stable services in remote and less populated areas of the country.¹²⁸

In its report the standing committee concluded that continued regulation, coupled with a degree of permitted competition, would best accomplish these goals. However, while the committee identified competition as the impetus necessary to stimulate carrier efficiency and service, its recommendations do not reveal any real reliance on market forces to achieve these goals. In its report the standing committee admonished the CTC to exercise care in increasing competition among the carriers in light of the weakness in the economy and limited traffic growth anticipated in the near future. It also added the following two caveats to its limited endorsement of competition: first, competition might be counterproductive where the entry of an additional competitor would serve to fragment the market to a point where load factors were significantly reduced or carriers were forced to use smaller, less efficient aircraft; and second, for sparsely populated remote areas, stability and adequacy of service should not be jeopardized by a level of competition that the market could not sustain on a year-round basis. The standing committee also refused to permit Wardair to offer scheduled service along with its advance-booking charter service.

As mentioned above, the standing committee's recommendation that extensive regulation of the air carrier industry be continued was at odds with a report published by the Economic Council of Canada in June 1981. In this report the council had recommended that the regulatory and policy constraints imposed on Canada's airlines be reduced substantially, that entry restrictions be eased, that carriers be given a large degree of latitude in establishing fares and that all route restrictions on existing carriers be removed.¹²⁹ The Economic Council argued, like other proponents of deregulation, that the efficiency of the industry would be enhanced if it were deregulated.

In December 1983 the minister of communications initiated a review by the Air Transport Committee of the CTC of the regulation of domestic air fares and charter regulations.¹³⁰ Following extensive public hearings, the Air Transport Committee released its interim report on May 9,

1984.¹³¹ In it, the committee recommended that regulation of the domestic air carrier industry be continued in accordance with the objectives set out in the standing committee's report. It endorsed the more liberal parameters of operation for national, regional and local carriers proposed by the standing committee and went further in recommending that no limitation be placed on the number of national or regional air carriers. The committee recommended that greater emphasis be given to the need for competition in the determination of applications for new routes and recommended the establishment of fare zones within which tariffs would only be required to be filed, and not approved.¹³² The committee also proposed the liberalization of the regulations governing domestic charters.¹³³

The day after the release of the interim report of the Air Transport Committee, on May 10, 1984, the minister of transport released a new Canadian air policy which called for substantial liberalization of airline regulation and an increased role for competition in the industry.¹³⁴ In this document the minister stated that the current regulatory system had, *inter alia*, hindered innovation, reduced carriers' flexibility to pursue new markets and to minimize costs, complicated airline planning and resulted in poor earnings for the industry. While rejecting complete deregulation, the minister called for a "staged movement" toward more competition and less regulation.¹³⁵

The new domestic air policy repealed all existing policies defining the three tiers of carriers and called for any new or existing carrier to apply for any route. It removed the requirement for intermediate stops on existing licences and called for reduced control of airline pricing. The minister asked the CTC to give much greater weight to the benefits of increased competition in judging the requirements of "public convenience and necessity" in issuing licences and directed the CTC to report back within 90 days on the manner in which the regulatory process might be simplified and streamlined.¹³⁶

On August 16, 1984 the CTC issued its report to the minister of transport on the steps taken by it and proposed to be taken by it in simplifying and speeding up the regulatory process.¹³⁷ Many of the steps recommended have already been implemented.

This recent series of debates, policy papers and proceedings concerning the regulation of domestic Canadian air carriers, which has taken place before the standing committee, the CTC and in the economic literature, is important in assessing the sufficiency of existing institutions to facilitate the development of the Canadian economic union. It demonstrates that in the field of aeronautics the federal government enjoys both jurisdictional power and the institutional infrastructure to formulate and implement a common air transport policy for the country as a whole. This has provided the federal government with the opportunity to guide the evolution of the air transportation industry from a

model of regulated monopoly to one of regulated competition as the industry developed and matured. The early policy of issuing a single licence to serve a particular route, which was pursued by the regulator for many years, was perceived by it to be most likely to achieve a stable airline industry serving disparate parts of Canada. This policy was pursued in response to extensive policy input from Parliament and the federal cabinet. The policy pursued furthered one of the goals of an economic union — the free movement of persons and goods. In their desire to ensure this type of stable public transport service, the government and the regulator allowed the airline industry itself only limited exposure to the market forces of competition.

Recent initiatives by the federal government at both the political and regulatory levels have resulted in an increased role for competition in the air passenger industry in Canada. This shift has occurred pursuant to a national policy initiative by the federal government and has been pursued in order to encourage the development of an efficient air transportation system and to provide consumers with a wider range of service. At the same time, the industry has not been totally deregulated. Indeed, while the regulatory process and the industry structure for domestic services in southern Canada have been greatly liberalized, the regulation of air service to the north has largely remained intact. In this large region of the country, airline service is often inadequate, and market forces are unlikely to provide the degree of service required at prices which are affordable. A recent report by the air transport committee on the "Adequacy of Air Services in Northern and Remote Areas" addresses the issue of how to ensure adequate air service to regions which are sparsely populated and distant from large centres of commerce.¹³⁸

COMMUNICATIONS

In the communications sector, a similar analysis may be made of the degree to which economic union may be achieved or hampered in different sectors of the industry depending on the de facto division of powers between the federal and provincial levels of government. As is apparent from discussion of the constitutional framework in the first section of this study, it is arguable that the *Constitution Act, 1867* as interpreted by the courts confers on the federal level of government jurisdiction, not only overall broadcasting transmitting and receiving undertakings, but also overall telephone and telecommunications carriers engaged in the provision of telephone or data services between the provinces, whether through the extension of the physical undertakings themselves beyond the limits of a single province or through interconnection arrangements which result in the creation of a national network.

In this sense, the federal government possesses the de jure constitutional power to formulate national communications policy in fur-

therance of the economic union. However, as mentioned in the first section, the exercise of this federal power in the broadcasting sector must be distinguished from its exercise in the telephone and data transmission sectors.

Broadcasting

In the broadcasting field, the courts have recognized the federal government's exclusive jurisdiction, thereby conferring on that level of government the legal means to formulate and implement a common national broadcasting policy. This the government has done through its broadcasting policy embodied in the *Broadcasting Act* and through the pervasive regulation of broadcasting transmitting and receiving (cable) undertakings by the CRTC.

Recently proposed amendments to the *Broadcasting Act* would further enhance the ability of the federal cabinet to direct broadcasting policy in Canada by permitting it the facility to give specific policy directives to the CRTC which would bind that body in its regulatory decision-making process.¹³⁹

In pursuing its mandate in the broadcasting field the federal government has regulated not only the technical aspects of radio frequency allocation, but also the control of Canadian and foreign programming content and the transfer of ownership of undertakings.

The result in the broadcasting transmitting sector (radio and television) has been the imposition of stringent entry requirements permitting only limited competition between commercial broadcasters, strict Canadian content regulations and, in the case of television and FM broadcasting, rules requiring compliance with promises of performance made by licensees during the initial licensing process and at subsequent renewals.¹⁴⁰ The extent of this regulation results in a limited opportunity for market forces to play a role in the industry.

In the cable distribution field, regulation of market entry, signal carriage priority, carriage of foreign signals, programming and non-programming services, transfers of ownership, and subscription rates have resulted in a situation where cable undertakings enjoy regulated monopoly franchises for the provision of service.¹⁴¹

One area in which cable undertakings have been given some scope to expand their involvement in the provision of competitive services is in the realm of "non-programming" services. In recent years cable television systems have started providing non-programming telecommunications services such as meter-reading, fire alarm and security surveillance, video games, information services, videotex and opinion polling.

On June 6, 1978 the CRTC announced that it was prepared to give consideration to applications by cable television licensees for the use of their systems to provide new communications services of a non-pro-

gramming nature.¹⁴² The commission asserted regulatory authority over the introduction of new services pursuant to section 5 of the Cable Television Regulations¹⁴³ which provides as follows:

A licensee shall not use, or permit the use of, its undertaking or any channel of its undertaking except as required or authorized by its licence or these Regulations.

The CRTC's authority to approve these new non-programming services was challenged by the telephone companies on the grounds that the commission's jurisdiction was limited to the regulation of broadcasting and that the services applied for were not broadcasting services within the meaning of the *Broadcasting Act*, inasmuch as they were to be provided by wire or cable and were not intended for direct reception by the general public.¹⁴⁴ The commission responded by indicating that its jurisdiction was over broadcasting receiving undertakings in their entirety, so long as they remained reliant on television signals and retained their ability to receive and transmit such signals.¹⁴⁵

Virtually all authorizations of non-programming services have been granted by the CRTC on an experimental basis. These authorizations have also been subject to conditions ensuring priority of carriage for off-air and local programming services, restricting the use of advertising, and prohibiting the cross-subsidization of non-programming by programming services.¹⁴⁶

While the federal government's broadcasting policy has severely limited the role that market forces play in the broadcasting industry itself, it has again resulted in the development of a common national policy, implemented by a single level of government, which has fostered the development of a national broadcasting service (the CBC) and has encouraged the development of a Canadian programming industry.

Telephone and Data Transmission

Notwithstanding the constitutional arguments in favour of exclusive federal jurisdiction over all principal telecommunication carriers in Canada, or at least over their interconnected interprovincial services, jurisdiction over Canada's major telecommunications carriers has historically been split in the manner indicated in the first section. In a practical sense, this means that no single level of government has the capacity to implement a common national telecommunications policy in this sector. While the federal government does regulate most of the telephone service in Quebec, Ontario and British Columbia, as well as the services offered by Canada's two specialized common carriers — Telesat Canada and CNCP Telecommunications — the provincial jurisdiction currently exercised over all facets of the telephone companies operating in the other seven provinces renders the implementation of national policies by the federal government virtually impossible.

In addition to the jurisdictional difficulties involved in establishing a common national telecommunications policy, the historical manner in which telephone companies have been regulated as monopoly franchises has inhibited the development of a competitive market in this service sector.

In Canada, the introduction of competition in the provision of telecommunications services is a recent development. As recently as a decade ago, few inroads had been made into local monopolies enjoyed by the various operating telephone companies. Public telephone service — both local and long-distance — was provided by telephone companies on an “end-to-end” basis. In the case of local service, individual telephone companies enjoyed a monopoly over both the transmission facilities and terminal equipment needed to operate the local network. In the case of long-distance service, the various telephone companies had entered into arrangements for the interconnection of their networks or local exchanges to carry communications traffic to points outside their individual operating areas. By 1958 the Trans Canada Telephone System (the predecessor of Telecom Canada), then composed of the eight major telephone companies, had cooperated in the construction of a national microwave system capable of more efficiently linking their respective networks across the country.

Public telegraph service in Canada was provided by CNCP on its own separate microwave network. In the early 1970s, CNCP provided the only competition for the existing telephone companies by virtue of its telex, data and private voice services. However, at that point in time, CNCP's telecommunications network was not interconnected with the telephone network operated by the Telecom Canada member companies, and traffic could not therefore be routed from one system to another, as was possible for Telecom Canada members to do. While the *Telesat Canada Act*¹⁴⁷ had been passed by Parliament in 1969 to establish a domestic satellite capability, Telesat had not yet launched its first satellite.

Within local areas, community antenna television (CATV) systems were being established, using coaxial cable to distribute television broadcasting signals. While these systems originated some local programming, they did not compete with the telephone companies in the provision of local telecommunications services. On the other hand, radio common carriers had been competing with the telephone companies for some time in the provision of radio paging and mobile radio services, but these services were not physically interconnected with the local telephone exchanges.

This situation has not remained static. While many elements described above remain in place a decade later, there have been a number of significant inroads made by new entrants into the telecommunications sector. This development has been spurred by changes in technology which have brought new pressures to bear on the telephone

companies to innovate, and have opened up market opportunities for new entrants. While these inroads have largely resulted from ad hoc responses by regulatory agencies to particular pressures for change, events have advanced in certain sectors of the industry and in certain jurisdictions of the country to a point where regulators are relaxing existing barriers to entry, deregulating former monopoly services and formulating general guidelines to govern the entry of competitive service providers.

The fact that Canada's nine major telephone companies and two domestic specialized common carriers are regulated by nine different regulators has had a serious impact on the development and implementation of nationally applicable telecommunications policies and regulations. This in turn has retarded the development of new national services by service providers other than Telecom Canada. The impact of this split in regulatory jurisdiction may be analyzed by examining the varying responses of federal and provincial regulators to the introduction of certain new competitive service offerings.

Message Toll Service

The telephone companies currently enjoy a de facto monopoly over the provision of public message toll or long-distance service in Canada. This monopoly is enjoyed in each telephone company's operating territory and is extended nationally on a cooperative basis through the web of connecting agreements and revenue sharing agreements discussed above — the most sophisticated of which is Telecom Canada's connecting agreement.

Each telephone company must obtain approval for its message toll rates in the same way as it does for its local rates. This applies equally to the rates charged for Telecom Canada services which are not separately regulated.

To date, the telephone companies have for the most part been successful in preventing competition from developing in public message toll service through monopoly control of their local exchange networks and their refusal to permit systems interconnection with competing private or public networks.

Systems interconnection would permit intercity carriers and other suppliers of telecommunications services competing with the telephone companies to offer their customers dial-up access to their networks through local facilities or equipment provided by the telephone company.

In Canada, in contrast with the United States,¹⁴⁸ no specialized common carriers have yet been authorized to provide interconnected public telephone long-distance service, and systems interconnection between competing networks has thus far only been considered in the case of CNCP Telecommunications and the radio common carriers.

The General Regulations of Bell Canada and other telephone companies have generally prohibited systems interconnection, preventing CNCP customers from having dial-up access to the telephone system.¹⁴⁹

In June 1976, CNCP applied to the CRTC for access to the Bell Canada network for certain of its private voice and public data services.¹⁵⁰ The basis for the application, brought under sections 265 and 320(7) of the *Railway Act*, was that, without interconnection, not only would certain markets continue to be foreclosed to CNCP, but existing markets would dwindle if access to the local switched telephone network, essential for a variety of data and private line voice services, continues to be denied. CNCP did not apply for interconnection for the purpose of providing public, local or long-distance voice telephone service.

The CRTC approved the application in May 1979 and issued an order permitting CNCP access to Bell Canada's system for a broad range of business purposes, for both public data and private voice traffic.¹⁵¹

The effect of the CRTC's decision was to affirm the right of competing carriers to interconnect with the telephone system, provided that, on balance, interconnection was found to be in the public interest.

The CRTC's decision in the Bell-CNCP interconnection case was the subject of a petition to the federal cabinet, pursuant to section 63 of the *National Transportation Act*. The cabinet refused, however, to vary the decision.¹⁵² CNCP has since been granted interconnection with B.C.Tel, the other major federally regulated telephone company, on the same terms and conditions, *mutatis mutandis*, as were ordered with respect to Bell Canada.¹⁵³ With the exception of NorthwTel and Terra Nova Tel, CNCP does not have interconnection with the other major telephone companies in Canada. Since the other Telecom Canada member telephone systems are regulated provincially, further systems interconnection by CNCP will require specific applications on a jurisdiction-by-jurisdiction basis. To date, CNCP has made one such application for interconnection with AGT in Alberta.¹⁵⁴ However, as outlined above, that proceeding is currently subject to a jurisdictional dispute before the Federal Court of Canada and has not yet been considered by the CRTC.¹⁵⁵

On October 25, 1983 CNCP applied to the CRTC for a more extensive form of system interconnection with the federally regulated carriers.¹⁵⁶ If successful, CNCP would be permitted to offer full competitive message toll service to the public. This application is being contested by the telephone companies and has been incorporated by the CRTC into a proceeding which raises issues related to the provision of a full range of competitive inter-exchange services, including resale and sharing of such services.¹⁵⁷ The CRTC's decision on these issues, which may affect the ability of provincially regulated telephone companies to continue to subsidize local service with long-distance revenues, is also being followed closely by provincial governments which have intervened in the proceedings. Again, however, despite the potentially wide-ranging eco-

conomic impact of this proceeding, the CRTC's ultimate disposition in these proceedings will only bind the federally regulated carriers. Concurrent hearings on this issue are being convened by the New Brunswick Public Utilities Board¹⁵⁸ giving rise to the possibility of different conclusions on interconnection being reached in that jurisdiction. The other provinces have not yet directed their attention to these issues. The result is a regulatory patchwork with no uniform national regulatory policy. CNCP's ability to offer a full range of services in competition with the telephone companies has been seriously curtailed in all but the federally regulated jurisdictions of Quebec, Ontario and British Columbia.

Terminal Attachment

Prior to August 1980, virtually all terminal telephone equipment connected to telephone networks in Canada was rented from the telephone companies because the connection of any equipment to the network required the telephone company's consent,¹⁵⁹ which consent was generally withheld.¹⁶⁰ However in August 1980, the CRTC authorized on an interim basis the connection of privately owned telephone terminal equipment meeting prescribed technical standards to Bell Canada's network.¹⁶¹ This decision marked the start of the competitive equipment sales market in Canada.

Subsequently, interconnection to the network of B.C.Tel was authorized.¹⁶² In November 1982, the CRTC authorized terminal interconnect to the networks of all federally regulated domestic carriers and finalized its earlier interim decision.¹⁶³ Interconnection of terminal equipment, including multi-line business telephone systems, has now also been permitted in those parts of the province of Alberta served by AGT,¹⁶⁴ in the Provinces of Prince Edward Island¹⁶⁵ and Nova Scotia¹⁶⁶ and in those remaining parts of Ontario¹⁶⁷ and Quebec¹⁶⁸ served by independent telephone companies. It has not yet been permitted to the same extent in other regulatory jurisdictions.¹⁶⁹

Once again, the situation in the provincially regulated jurisdictions varies greatly. To date, only the Quebec, Ontario, Prince Edward Island, Nova Scotia and Alberta public utilities boards have permitted the same degree of liberalized terminal attachment as the CRTC and have endorsed the same uniform set of technical standards — the TAPAC standards¹⁷⁰ developed under the auspices of the federal department of communications. In each jurisdiction the terms and conditions governing attachment differ to some extent as do the rules governing participation by the regulated utilities in the market. In some cases provisions which create the possibility for deviation from the TAPAC technical standards have also been approved.¹⁷¹

The result is again a regulatory patchwork. A common communications policy has not been achieved, and equipment manufacturers and suppliers now face the possibility of having eleven different sets of

regulations in ten provinces impact on their businesses. At present, four provinces still effectively deny any market entry at all.¹⁷²

Mobile Radio

Interconnected conventional mobile radio services are currently provided by a number of telephone companies. The use of radio frequencies for operation of these services is licensed by the Department of Communications. The tolls charged by the federally regulated telephone companies for use of mobile radio services are regulated by the CRTC while the rates charged by other radio common carriers are not regulated at either the federal or provincial levels of government.

Until recently, the telephone companies enjoyed a monopoly over the provision of interconnected mobile service. However, Bell Canada and B.C.Tel have now been required by the CRTC to permit the interconnection of mobile radio services offered by radio common carriers to the public switched telephone network on terms equivalent to those on which Bell and B.C.Tel utilize such facilities.¹⁷³ This follows similar requirements with respect to the provision of dial access to radio paging systems which had been ordered in earlier proceedings.¹⁷⁴ Again, the situation in the provinces varies with some jurisdictions permitting interconnection.¹⁷⁵

The development of cellular radio mobile telephone service in Canada is still in the early stages and provides an interesting comparison to the situation which currently obtains with respect to other radio mobile telephone and paging services. In October 1982, the Department of Communications issued a public notice¹⁷⁶ calling for applications to provide cellular mobile radio service in 23 metropolitan areas.¹⁷⁷

In its notice the department stated that it would grant one licence to each of the operating telephone companies serving the 23 areas in question and one competing licence to another successful non-wireline applicant (CNCP was included in the non-wireline group). Subsequently, in August 1983, the department amended its policy with respect to the competing licences and decided to award all 23 non-wireline licences to a single national carrier to compete with the telephone companies in each of the 23 metropolitan areas. A decision to license one of the five competing non-wireline national applications was made in December 1983 and Cantel Cellular Radio Group Inc. was selected.

On October 25, 1984 the CRTC announced that it would forbear from regulating rates charged by cellular radio services where such services are provided by Cantel or an arm's-length subsidiary of a telephone company. This decision was made despite the fact that the CRTC determined that such providers are "companies" within the ambit of sub-section 320(1) of the *Railway Act*.¹⁷⁸

The CRTC has also issued a decision requiring the federally regulated carriers to permit interconnection of the competing cellular mobile radio service to the public telephone network.¹⁷⁹ Such interconnection is of

course vital to the success of cellular radio services which will rely on access to and from the local telephone network. However, this decision only applies to the federally regulated telephone companies, and separate applications for interconnection will have to be made to the various provincial regulatory bodies prior to interconnection with the other telephone companies. Some of the provincial carriers have already expressed initial opposition to any form of interconnection.¹⁸⁰ Again, the split jurisdiction between the federal and provincial levels of government may pose an obstacle to the implementation of a national policy with respect to cellular communications.

In an interesting move, the federal Department of Communications has used its exclusive jurisdiction over the issuance of cellular radio licences to attempt to force the provincially regulated telephone companies to permit the interconnection of Cantel's system to the public telephone network. The minister has announced that no licences will be issued to any telephone company until such time as it has entered into connection agreements with Cantel and had them approved by the appropriate regulator.¹⁸¹

It is conceivable that a stalemate may result in some provinces with the end result being that no cellular service may be implemented therein at this time. This again underscores the serious jurisdictional difficulties encountered in implementing a common national telecommunications policy in Canada.

Enhanced Services

The issue of enhanced services has also been approached in an ad hoc manner by Canada's various regulatory bodies. The CRTC is the only regulatory tribunal to date which has considered the issue in detail.

On July 12, 1984 the CRTC issued Telecom Decision CRTC 84-18 in which it considered various issues relating to the competitive provision of enhanced telecommunications services by both carriers and other service providers.¹⁸² An "enhanced service" is a service offering which employs the transmission facilities of a telecommunications carrier to provide something more than just a basic communications function. Most commonly, computer processing applications are used to act on the content, code, protocol or other aspects of the subscriber's information input, to "enhance" the transmission services. Examples include voice messaging, database retrieval and sophisticated electronic mail applications.

In its decision, the CRTC determined that both carriers and non-carriers should be permitted to engage in the provision of enhanced telecommunications services. This in turn involved a decision by the CRTC to permit the resale of carrier-provided transmission services by those companies wishing to provide enhanced services for this limited purpose.

Again, the conclusions reached in these proceedings by the CRTC are

only applicable to the federally regulated telecommunications carriers. At present, the only other Board considering the issue of interexchange competition is the New Brunswick Board of Commissioners of Public Utilities. This again presents the possibility of another regulatory and market patchwork developing. For example, since the regulations governing the provincially regulated telephone companies currently prohibit the resale of transmission services, the competitive provision of enhanced services in the areas served by these carriers may not at present be permitted. This presents a regulatory obstacle of entrance barrier to the offering of enhanced services on a national basis by non-carriers.

The current bifurcation of regulatory authority over telecommunications carriers in Canada therefore presents a significant impediment not only to the development and implementation of a common Canadian telecommunications policy, but also to the development of new competitive telecommunications services on a national basis. The regulatory patchwork which exists provides a direct obstacle to the creation of an economic union.

The Requirements of Transportation and Communications in Nation Building

In this section of the study the historical importance of transportation and communications in building the Canadian nation and the increasingly important role of telecommunications in the new "information age" will be discussed. Against this background, constitutional and institutional impediments to the achievement of national goals and economic union will be assessed with a view to identifying areas in need of reform.

The development of a national transportation system has always had a high priority in Canada. The size of the country, its rugged terrain, sparse population, scattered resource allocation and geographic proximity to the United States have all served to provide both levels of government with a strong economic and political incentive to develop an adequate system of transportation.¹⁸³ Indeed, in the view of many historians, the nation itself was built around the construction of the Canadian Pacific Railway.

Since then, transportation has in large measure provided the means to develop the country's natural resources, get products to market and unite disparate regions of the country. Many of the country's rail links, waterways and roadways were forged with these specific economic goals in mind.

In the 1980s this situation has not changed dramatically. Although the railways' importance as a means of passenger transportation has diminished, railways are still being built to provide access to natural

resources, as evidenced by the government of British Columbia's current involvement in the construction of a railway from the B.C. coal fields to new port facilities on the Pacific coast for the export of coal to Japan. Freight rates continue to be of central importance to western wheat farmers, as demonstrated by reaction to the federal government's recent reformulation of the historic "Crows Nest" freight rates in the *Western Grain Transportation Act*.¹⁸⁴ Air transportation has taken over from rail in the realm of passenger transportation and is regarded by business as an essential transportation service. Road transportation remains of vital importance at both a local and interprovincial level providing the means to move a large volume of resources, produce and manufactured goods to market.

The increasing development of container traffic has presented new challenges to the constitutional framework. This technological development, which relies on multi-modal forms of transportation including shipping, rail and trucking, raises new impediments to economic union which have yet to be resolved. The possibility of several regulatory regimes at both the federal and provincial level impacting on this form of transportation raises serious questions as to the ability of the existing constitutional framework to foster its effective and efficient development.

In particular, multi-modal transportation raises difficult constitutional issues relating to the characterization of undertakings providing this form of service. The Federal Court of Canada's decision in the *Cannet* case¹⁸⁵ raises the prospect of each mode of transportation falling subject to a unique regulatory regime in the traditional manner. This type of multi-faceted regulation may unduly retard the efficiency of this technology.

While the transportation system has always had a central role to play in the development of Canada from an economic and political standpoint, the emergence of telecommunications as an essential service has for technological reasons been of more recent vintage.

The steady advances in technology that have been witnessed since Confederation, particularly in the past two decades, have consistently increased the economy's dependence on information bases and have served to turn our communications system into an economic lifeline or electronic highway to which our economic future and independence is linked in much the same way as it was once linked to the railways.

The two single most important developments in this ascendancy of telecommunications, other than the invention of telephony, have been the invention of the computer and ultimately the microprocessor. The development of computer technology with its information retrieval and processing capabilities provided the initial thrust toward the creation of the "information society." The refinement of this technology and the use of the computer chip in microprocessors has in turn led to a great many combined telecommunications and information functions being performed by the same equipment. These advances in technology have in a

sense caused a convergence of computer and telecommunications technologies that has served to blur the old distinctions between the information carriage industry and the information processing industry. This convergence of technologies has broken down other industry boundaries as well. The information provision industry, including the print media, has found itself in potential competition with hybrid computer-based telecommunications services, such as videotext services, and the financial services industry has also found extensive uses for the new combination of telecommunications and computer-processing services.

This technological revolution has furnished the capacity to use the telecommunications network for a great many more functions than was once contemplated and has raised many questions regarding the manner in which the system is to evolve.

The issues raised in this context include not only the manner in which the new communications system is to be regulated, but also the degree of access to the system which should be granted to information providers and processors, the need to create common technical standards, separation of content and carriage by carriers, protection of privacy, national security and the economic independence of Canada.

The growing importance of the telecommunications system for the economic development of Canada and the nature of the regulatory issues posed by its emergence call for the formulation of a common national policy to guide and assure its rational development.

The existing division of jurisdiction over Canada's telecommunications carriers between the federal and provincial levels of government makes the formulation and implementation of such a policy difficult and unlikely. Canada lacks the necessary institutional framework to perform this task. Past experience in the telecommunications sector indicates that regulatory initiatives taken by the CRTC in relation to the federally regulated carriers are often not followed by its provincial counterparts or are followed with or without modification after varying time lags.

The current inability of a single level of government to regulate Telecom Canada or to authorize CNCP Telecommunications to interconnect with the provincial carriers seriously impedes the development of a competitive communications system in Canada and will likely result in a piecemeal approach to the introduction of new enhanced or value-added computer-oriented telecommunications services in Canada.

This could have serious economic implications both for Canadian telecommunication carriers and Canadian companies wishing to participate in the market as providers of enhanced services. Canada already lags far behind the United States in the development of these types of services, and there is an increasing danger that if Canada does not keep pace, more and more information processing and related services will be diverted to the United States or be provided in Canada by foreign companies. To the extent to which these services do not become available in certain sectors of the country, due to divergent regulatory pol-

icies being pursued, business users will also suffer a competitive disadvantage and the system itself will lack a uniform national dimension.

Recent experience in the terminal equipment market with the liberalization of terminal attachment is indicative of the degree to which the Canadian market can become fractured by the pursuit of diverging regulatory policies by provincial and federal regulators. Current experience in the evolving cellular radio field highlights the difficulties of introducing a new national telecommunications service in Canada when that service relies on the interconnection with the various provincially regulated telephone companies. The development of CNCP Telecommunications' private and public telephone and data network has been similarly hampered. There is no indication that the introduction of enhanced telecommunications services by competitors using the underlying facilities provided by these telecommunications carriers will receive any more favourable or uniform treatment.

In short, the development of a common telecommunications strategy in this vital sector of the economy is seriously impeded by the lack of central authority over all of Canada's telephone and data carriers.

Constitutional or Statutory Change

In this section of the study, past proposals for constitutional reform will be analyzed. This focus on previous attempts to alter the jurisdictional and institutional framework governing the transportation and communications sectors is useful in considering the course that future constitutional change should take. In performing this analysis particular emphasis will be placed on the communications sector, since it is in this realm that most of the debate on reform has centred.

Finally, the usefulness of delegation as a tool to circumvent the formal constitutional amendment process will be assessed.

Transportation

The existing division of legislative power over transportation did not receive much attention in the constitutional talks leading up to the enactment of the *Constitution Act, 1982*. The lack of priority given to this subject matter in the federal-provincial negotiations may be explained by a comparative lack of conflict over the existing framework.

In 1978, the Canadian Bar Association's (CBA) Committee on the Constitution released a study entitled *Towards a New Canada*¹⁸⁶ which made a number of recommendations for constitutional reform. Chapter 20 of this document was devoted to transportation.

In its study, the CBA expressed general satisfaction with the present lines of division between federal and provincial jurisdiction over transportation. The CBA agreed with the basic interprovincial/intraprovincial dichotomy with respect to ground transportation and the federal govern-

ment's exclusive jurisdiction over aeronautics and water navigation.¹⁸⁷ While the CBA recommended that the provincial governments be given some input into the process of declaring any local work to be for the general advantage of Canada under paragraph 92(10)(c) of the *Constitution Act, 1867*,¹⁸⁸ no major changes in the current division of powers, as interpreted by the courts, was proposed.

In 1980, the constitutional committee of the Quebec Liberal party released a study entitled *A New Canadian Federation*¹⁸⁹ which, inter alia, proposed recommendations for the amendment of the federal-provincial division of powers in the transportation and communications sectors.

This study did not propose dramatic changes to the current constitutional framework governing transportation. The Quebec Liberal party recommended generally that the federal government's exclusive jurisdiction over air and water transportation be retained as well as the current dichotomy of federal and provincial jurisdiction over interprovincial and intraprovincial railways and pipelines.¹⁹⁰ The interprovincial or international character of the majority of the participants in these industries was thought to justify this conclusion. The Quebec Liberal party did, however, recommend that composition of the Canadian Transport Commission (CTC) should more closely reflect regional and provincial interests and that the siting and construction of airports should comply with provincial land planning priorities.¹⁹¹

With respect to road transport, the study recommended that the provincial governments be given exclusive regulatory authority.¹⁹² The Quebec Liberal party expressed the view that road transport is mainly linked with local commerce having an important relationship with the construction and maintenance of roads as well as the regulation and development of natural resources. Furthermore, it was noted that, in practice, jurisdiction over interprovincial motor vehicle undertakings had been delegated to the provinces by the federal government. It was believed that this aspect of regulation could be looked after through cooperation between the provinces concerned.

This approach is in contrast with that taken by the CBA which acknowledged that the federal government had in the past delegated to the provinces its power to regulate interprovincial motor vehicle undertakings but which opposed an abdication of this power. The CBA argued that a single level of authority over interprovincial undertakings should be retained in the interest of ensuring the continued development of a national transportation system.¹⁹³

Communications

The decade preceding passage of the *Constitution Act, 1982* saw a concerted effort by the federal and provincial levels of government to

renegotiate the lines of jurisdiction in the communications field. These negotiations culminated in the discussion of both federal and provincial proposals at the Constitutional Conference in August 1980.¹⁹⁴

At the 1980 Constitutional Conference the federal and provincial governments tabled a set of specific amendments to section 91 of the *British North America Act* (now the *Constitution Act, 1867*) which would have resulted in a number of changes in the division of powers between the two levels of government.

TELEPHONE

In the area of telephone service, the federal proposal called for exclusive federal jurisdiction over "interprovincial and international telecommunications services and the technical aspects of telecommunications."¹⁹⁵ The provinces were in turn offered exclusive jurisdiction over "telecommunications carrier works and undertakings in the province other than: (a) national and international telecommunications carriers; (b) space and satellite telecommunications carriers including related earth stations; and (c) carriage on all or any telecommunications carriers in the province of telecommunications for a national purpose."¹⁹⁶ The federal government also proposed to retain exclusive federal jurisdiction over the "frequency spectrum including technical aspects only of frequency assignment."¹⁹⁷

This proposal, which had been antedated by and had drawn on the federal government's 1973 "Green Paper"¹⁹⁸ and its 1975 "Grey Paper,"¹⁹⁹ would have resulted in a two-tier system of regulation analogous to the division in the United States between the Federal Communications Commission (with jurisdiction over interstate communications) and the various state regulators (with jurisdiction over interstate communications). The proposal would have resulted in all existing carriers, other than Canada's national and international specialized common carriers (Telesat Canada, Teleglobe Canada and CNCP Telecommunications) falling subject to two levels of regulation with the provincial level regulating the undertaking itself and its intraprovincial service offerings, and the federal level regulating the interprovincial and international service offerings of those same carriers. Although not spelled out in the proposed constitutional amendment, the federal government informed the provinces that it would be prepared to create, by means of federal legislation with appropriate provincial input, a new regulatory board with full-time federal and provincial representation, which would have regulatory authority over all aspects of interprovincial rates and services provided by the provincial carriers including interconnection arrangements.²⁰⁰

This federal proposal would have had the practical effect of transferring regulatory jurisdiction over the intraprovincial operations of

B.C.Tel, Bell Canada and Terra Nova Tel to the provinces of British Columbia, Ontario, Quebec and Newfoundland, while transferring to the federal government jurisdiction over the interprovincial and international services provided by the telephone companies serving the three Prairie provinces and the four Atlantic provinces.

It was the expressed hope of the federal government that this new arrangement would provide it with the jurisdiction necessary to oversee the development of a national telecommunications network while at the same time allowing the provinces autonomy over the local operations and facilities of the provincial carriers.²⁰¹

The provincial response to this federal proposal was contained in a document known as the "Best Efforts Draft"²⁰² presented to the Constitutional Conference in August 1980. The "Best Efforts Draft" proposed a form of concurrent jurisdiction over telecommunications works and undertakings, other than those wholly situate within a single province, with provincial paramountcy over federal jurisdiction in all aspects except: "matters of a technical nature respecting management of the radio frequency spectrum; the space segment of communication satellites; and the use of telecommunication works and undertakings for aeronautics, radio-navigation, defence, or in national emergencies."²⁰³

The provincial proposal also contained a stricture providing that no law enacted by either level of government "shall in its pith and substance be directed to the disruption of the free flow of information"²⁰⁴ and provided further that, "In the event that the laws of two or more provinces conflict so as to disrupt the free flow of information, one of the provinces may petition the Parliament of Canada to enact a law to resolve the specific conflict and such law shall prevail."²⁰⁵

The practical implication of this provincial proposal would have been to confer on the provinces exclusive jurisdiction over all telecommunications works and undertakings located solely within provincial boundaries and concurrent but paramount provincial jurisdiction over those works and undertakings extending beyond provincial boundaries. If such a proposal were adopted, jurisdiction over the intraprovincial operations of Bell Canada, B.C.Tel and Terra Nova Tel would be transferred to the provinces.

The result of this provincial proposal would have been that no single level of government would have jurisdiction over interprovincial, national or international services offered by Canada's telecommunications carriers either on national networks or jointly through cooperative arrangements. The proposal therefore ignored the national aspect of the Canadian telecommunications system which the federal government has consistently sought to establish in its proposals and which the constitutional framework supports.²⁰⁶

This national dimension of telephone and data transmission facilities and services was recognized by the Canadian Bar Association (CBA) and the Quebec Liberal party in their briefs on the subject.

In its brief entitled "Towards a New Canada" which was released in 1978, the CBA proposed that the federal government be given exclusive jurisdiction over the interprovincial services offered by carriers and that the federal and provincial legislatures enjoy concurrent legislative power, with federal paramountcy, over intraprovincial services offered by such carriers.²⁰⁷

Once again in making this recommendation, the CBA recognized both the federal government's interest in maintaining a national telecommunications system and the provincial governments' interest in setting local rate structures within their political boundaries.²⁰⁸

In its brief, entitled "A New Canadian Federation" presented to the constitutional committee in January 1980, the Quebec Liberal party also recognized a national dimension to telecommunications but gave it less weight than did the CBA. The party recommended that all telephone companies be made subject to provincial jurisdiction and that federal jurisdiction, "if it is to remain," should be strictly limited to the regulation of interprovincial and international telephone service.²⁰⁹ The party equated the regulation of local telephone rates with consumer protection within the province — a matter under provincial jurisdiction.²¹⁰

These proposals for reform reveal obvious differences in opinion over the degree to which the national dimension of telephone and data communications justifies federal jurisdiction in the field. The provincial "Best Efforts Draft" downplays this dimension to a degree where federal jurisdiction over even interprovincial undertakings would be subject to provincial paramountcy. The CBA proposal is at the opposite end of the spectrum in recommending paramount federal jurisdiction over even intraprovincial carriers.

BROADCASTING

In the field of broadcasting, the federal draft on communications presented to the Constitutional Conference in August 1980 proposed a split in jurisdiction over broadcasting undertakings providing programming services beyond the limits of a province and those providing such services within the province.²¹¹ The federal government proposed to retain exclusive jurisdiction over the frequency spectrum including technical aspects of frequency allocation.²¹²

This proposal would have resulted in a dramatic transfer of power from the federal to the provincial governments, leaving the federal level with responsibility for national services such as the CBC and national and interprovincial broadcasting networks.

For their part, the provinces proposed in their "Best Efforts Draft" that they obtain exclusive jurisdiction over intraprovincial broadcasting undertakings and concurrent but paramount jurisdiction over interprovincial broadcasting undertakings, other than networks extending to four or more provinces which would be subject to exclusive federal

jurisdiction.²¹³ Again, the provincial proposal conceded exclusive federal jurisdiction over “matters of a technical nature respecting management of the radio frequency spectrum”²¹⁴ and “the use of telecommunication works and undertakings for aeronautics, radio-navigation, defence, or in national emergencies.”²¹⁵

In the field of cable distribution, the federal draft proposed a split jurisdiction over cable undertakings on an intraprovincial/interprovincial basis.²¹⁶ Since very few cable distribution systems span provincial borders, this proposal would result in a significant shift in jurisdiction from the federal to the provincial governments. Under its proposal, the federal government would still retain the exclusive power to regulate the distribution and priority of distribution of a “national program service” on cable distribution systems as well as distribution of non-Canadian programming.²¹⁷

The provinces, on the other hand, proposed to acquire exclusive jurisdiction over intraprovincial cable distribution undertakings and concurrent but paramount jurisdiction over interprovincial undertakings “(if any).”²¹⁸ The provincial proposal would confer on the federal government exclusive jurisdiction over the redistribution of foreign signals and the signals of Canadian broadcasting networks extending to four or more provinces.²¹⁹ This latter proposal was again designed to ensure the priority carriage of national broadcasting networks on cable systems and to provide the federal government with power to limit the carriage of foreign signals by cable operators.

The Canadian Bar Association (CBA) proposal recommended a form of concurrent federal and provincial jurisdiction over a number of facets of broadcasting. The CBA recommended that the federal government retain exclusive jurisdiction respecting private radio communications, the allocation of radio frequencies and the technical requirements respecting the operation and specifications of apparatus used for transmitting and receiving radio communication.²²⁰ However, it recommended that the licensing and regulation of broadcasting undertakings (radio, television, cable television systems as well as closed circuit cable systems), be subject to the concurrent jurisdiction of both levels of government with federal paramountcy.²²¹

What the CAB envisaged in its study was that the federal government would continue to exercise a role in developing and implementing a national broadcasting policy leaving as much leeway as possible to the provincial governments to regulate local programming and local cable distribution systems serving local areas within each province.²²²

In the broadcasting sector, the Quebec Liberal party recommended retention of exclusive jurisdiction by the federal government over frequency allocation and technical standards.²²³ However, it expressed the view that neither level of government be empowered to control the content of the electronic media — leaving such matters to individual

choice, subject only to consumer protection and criminal laws of general application. The party recommended that both levels of government rather be permitted to influence content through their direct participation in broadcasting.²²⁴

As in the case of the telephone sector, the two levels of government and other participants in the discussions had a fundamental disagreement over the degree to which the federal government should be empowered to carry out policies promoting a national broadcasting system in Canada.

TASK FORCE ON CANADIAN UNITY

The observations and recommendations of the Pepin-Robarts Task Force on Canadian Unity entitled *A Future Together* also addressed this issue of constitutional reform when it was released in January 1979.²²⁵ In its report the task force recommended that Quebec should be assured the full powers needed for the preservation and expansion of its distinctive heritage.²²⁶ To accomplish this, the task force stated that either exclusive or concurrent jurisdiction over a number of functional heads of power, including communications, would have to be assigned to either all the provinces or to Quebec specifically.²²⁷

The task force recommended that this assignment be achieved by two methods: placing communications under concurrent jurisdiction with provincial paramountcy, thus leaving the provinces with an option whether to exercise their powers; or providing in the Constitution a procedure for the intergovernmental delegation of legislative powers. Both methods were in fact recommended by the task force for use.²²⁸

The task force acknowledged that the communications sector is a field in which both levels of government believe they have a legitimate interest:

In communications, the clash arises between the central government's view of communications as an integrated Canada-wide system serving as a powerful instrument for nation building and the insistence of the provinces, particularly Quebec, that the impact of communications particularly on local and provincial responsibilities is so pervasive that provincial control is necessary for them to meet the demands placed upon them and for the provinces to safeguard regional and local distinctiveness.²²⁹

The task force recommended that each aspect of the contentious areas of jurisdiction be analyzed to determine which level of government might most appropriately prevail — either exclusively or concurrently. Once this was done, it was envisaged that an agreement would be entered into between the two levels of government setting forth this delineation. The task force did not, however, make specific recommendations on the delineation of federal-provincial responsibilities in the communications sector.

Delegation

As mentioned above, the Pepin-Robarts Task Force on Canadian Unity recommended that the Constitution be amended to provide a procedure for the intergovernmental delegation of legislative powers and that such a delegation of powers take place following the negotiation of an agreement between the two levels of government on how best to redistribute their legislative powers in the field of communications.

In the first section of this study the issue of delegation was raised in the context of motor vehicle transportation. As will be recalled, the provisions of the federal *Motor Vehicle Transportation Act*, which delegate to provincial regulatory authorities the power to license interprovincial motor vehicle undertakings, were upheld by the Supreme Court of Canada in *Coughlin v. Ontario Highway Transport Board*.²³⁰

The delegation tool has also been considered for use by the federal government in the communications field. In November 1978 the federal government introduced for first reading Bill C-16 — the *Telecommunications Act*²³¹ which was a comprehensive piece of legislation designed to provide in one statute for the regulation of the whole telecommunications field including broadcasting, cable and telephone service. The *Telecommunications Act* set forth a number of criteria to govern the development of a “Canadian telecommunications system”²³² in much the same way as the *Broadcasting Act* currently sets out the criteria to govern the development of a national broadcasting policy.

While Bill C-16 did not purport to amend the current distribution of legislative powers between the federal and provincial governments, it did include a provision which would have enabled the minister of communications to participate in the delegation of powers to the provinces and similarly to exercise powers delegated to him by the provinces. This provision read as follows:

- 7.(1) The Minister may, with the approval of the Governor in Council, negotiate an agreement with the government of a province respecting
 - (a) the exercise by the Minister or the Commission of such powers, duties or functions of a provincial regulatory body as are specified in the agreement; or
 - (b) the exercise by a provincial regulatory body of such powers, duties or functions of the Minister or the Commission under this Act as are specified in the agreement.

Bill C-16, if enacted, would therefore have opened the door to the type of negotiation of jurisdictional agreements that was recommended in the report of the Task Force on Canadian Unity. As such it would have enabled the delegation of regulatory powers in the communications sector to be achieved in a manner similar to that which has transpired in the motor vehicle transport sector. Bill C-16 was however never passed into law.

It is important to note that in both Bill C-16 and in the *Motor Vehicle Transport Act* the delegation which occurs is the delegation to a regulatory agency set up by the other level of government of a power to regulate — rather than a transfer of jurisdiction from one level of government to another. The latter form of delegation was ruled ultra vires by the Supreme Court of Canada in the *Nova Scotia Inter-delegation* case.²³³ It was for this reason that the Pepin-Robarts task force recommended a constitutional amendment to permit intergovernmental delegation by either level of government.

Notwithstanding that this form of inter-delegation clause has found expression in the constitutions of other federal states, such as Australia,²³⁴ it is difficult to see how the embodiment of a similar provision in the Canadian Constitution would alleviate the jurisdictional impasses currently experienced in the communications sector, in particular, or advance the pursuit of an economic union in this sector.

To begin with, the inter-delegation can only take place if an agreement is reached between the parties on what powers are to be redistributed. The existence of an inter-delegation procedure would not of itself be likely to advance the conclusion of such an agreement which past history has proven difficult to conclude.

Secondly, if the assumption is made that an inter-delegation provision would permit single provinces to transfer specific powers to the federal government, the current patchwork of regulatory authority in certain sectors could conceivably be worsened by the use of such a device.

In Australia, where the state governments are empowered to delegate powers to the federal parliament, the power is little used, since all six state governments must approve the transfer.²³⁵ Such a requirement would not be any easier to implement in Canada and would not advance the formal amendment process to any significant degree.

It is interesting to note that in their comments on the delegation of regulatory power over interprovincial motor vehicle carriers, the Canadian Bar Association (CBA) and the Quebec Liberal party took different approaches to the delegation issue. While the party argued that the federal government might as well relinquish all jurisdiction over the interprovincial undertakings, since it had already delegated most of their powers in this field to the provincial regulatory boards, the CBA favoured the continuation of delegation. As noted above, the CBA argued that a single level of authority over interprovincial undertakings should be retained in the interest of ensuring the continued development of a national transportation system.

This position has merit in a constitutional context. The existing parameters for delegation have the advantage of being revocable or amendable as time goes on and as circumstances change. No jurisdiction is abdicated. When new concerns arise, new arrangements can be made.

This is important in the transportation and communications sectors

where rapid changes in technology may be expected to alter the importance of existing regulatory powers. There is always a danger that in the "horse trading" that has in recent years become the hallmark of constitutional negotiations, short-sightedness may result in the abdication of a power which may later become indispensable to the implementation of a national policy required to advance the economic union.

Delegation, therefore, has a role to play in modifying the constitutional division of powers between the federal and provincial levels of government in the interest of promoting the objectives of economic union, so long as all of the governments involved can reach agreement on the parameters of such delegation.

Conclusions and Recommendations

In the transportation and communications sectors, the application of various judicial doctrines of interpretation to the division of powers in the Constitution has left the federal level of government with widely varying power over different aspects of each of these industrial or service sectors. This has in turn had an impact on the degree to which an economic union has been achieved or is achievable in each such sector.

For example, judicial interpretation of the federal government's power to legislate with respect to the "peace, order and good government of Canada" has led to exclusive federal jurisdiction over all aspects of aeronautics. And the judicial view of broadcasting transmission and reception as a single indivisible function, coupled with a recognition that radio signals do not respect political boundaries, has led to exclusive federal jurisdiction over radio communication including radio, television, cable television, microwave and satellites.

Extensive federal control over navigation and shipping has also been assured by virtue of a combination of subsections 91(9), (10) and (13) and paragraphs 92(10)(a) and (b) of the *Constitution Act, 1867*.

In these sectors of transportation and communications, the Constitution supports the ability of a single level of government to formulate and implement a common economic or regulatory policy for the country and empowers that level of government to facilitate the creation of an economic union.

In other sectors of the transportation industry, the situation is different. In the areas of motor vehicle transportation, pipelines and rail, judicial interpretation of paragraphs 92(10)(a) and (b) has resulted in a split in jurisdiction over the regulation of interprovincial undertakings and intraprovincial or local undertakings. Through use of a number of judicial doctrines of interpretation, the courts have held that undertakings performing both intraprovincial and interprovincial functions fall under exclusive federal jurisdiction and that undertakings connected to and forming part of a wider interprovincial undertaking also fall under

federal jurisdiction, thereby widening the ambit of federal jurisdiction and generally eliminating the double regulation of single undertakings.

The application of these doctrines has resulted in the federal level of government enjoying a sufficient degree of jurisdiction to implement national economic and regulatory policies in these sectors. In the motor vehicle sector, however, the federal government has chosen to delegate to provincial regulatory bodies most of its powers to license and regulate interprovincial undertakings. This has resulted in ten different levels of government sharing the regulatory function — a situation which thwarts the formulation and implementation of a common national policy in this sector but which strengthens the provinces' ability to regulate local and regional transportation systems.

In the telecommunications sectors, the courts have not yet determined the extent of jurisdiction enjoyed by the federal government over carriers engaged in the provision of telephone and data services. Historically, the split in jurisdiction between the federal and provincial levels in telecommunications has not coincided with the division of powers in other sectors, which has generally been dictated by constitutional provisions. There is neither an intraprovincial-interprovincial split in jurisdiction, nor exclusive jurisdiction by one level of government over the field. What has evolved is a patchwork of regulatory jurisdictions with Canada's two largest telephone companies and two specialized domestic common carriers falling subject to federal jurisdiction, and seven major provincial carriers and a host of smaller companies falling subject to provincial or municipal regulation in all ten provinces. Telecom Canada, an association of the ten principal carriers, which currently facilitates the operation of Canada's only national public switched network, is not regulated as an entity at all — its member companies being individually regulated at the federal or provincial levels.

This patchwork of jurisdictions has made it impossible for any single level of government to implement a common national policy for telecommunications in Canada and has hindered the creation of alternative national networks and services.

New technological developments in the computer and telecommunications sectors, which have resulted to a large extent in the merging of technologies and the launching of a new information age, have served to heighten the importance of the telecommunications system to the economic development of Canada. The economic, social and political issues raised by these developments call for the development of a common telecommunications policy.

The current inability of a single level of government to regulate Telecom Canada or to authorize CNCP Telecommunications to interconnect with the provincial carriers, for example, seriously impedes the development of a competitive communications system in Canada and will likely result in a piecemeal approach to the introduction of new enhanced or

value-added computer-oriented telecommunications services in Canada.

This could have serious economic implications both for Canadian telecommunication carriers and Canadian companies wishing to participate in the market as providers of enhanced services. Canada already lags far behind the United States in the development of these types of services, and there is an increasing danger that if Canada does not keep pace, more and more information processing and related services will be diverted to the United States or be provided in Canada by American companies. To the extent to which these services do not become available in certain sectors of the country due to divergent regulatory policies being pursued, business users will also suffer a competitive disadvantage.

Recent experience in the terminal equipment market with the liberalization of terminal attachment is indicative of the degree to which the Canadian market can become fractured by the pursuit of diverging regulatory policies by provincial and federal regulators. Current experience in the evolving cellular radio field highlights the difficulties of introducing a new national telecommunications service in Canada when that service relies on interconnection with the various provincially regulated telephone companies. There is no indication that the introduction of enhanced telecommunications services by competitors using the underlying facilities provided by these telecommunications carriers will receive any more favourable or uniform treatment.

In short, the development of a common telecommunications strategy in this vital sector of the economy is seriously hampered by the lack of central authority over all of Canada's telephone and data carriers.

Various attempts to alter the constitutional division of powers over transportation and communications have failed. In all cases, it has been the clash between the local interests of the provinces and the national policy objectives of the federal government which has led to the impasse. The provincial proposals calling for the transfer of jurisdiction over interprovincial motor carrier undertakings and the creation of paramount provincial jurisdiction over telecommunications undertakings (both broadcasting and telephone), would seriously undermine the creation of common transportation and communications policy in Canada and would impede the fulfilment of economic union. At a minimum, the federal government must retain jurisdiction over the interprovincial and international aspects if orderly development is to be encouraged and if the challenges of the information age are to be met.

In the telecommunications sector this means asserting federal jurisdiction over the members of Telecom Canada. As mentioned above, the issue is currently before the courts, and a judicial resolution of the issue in favour of the federal government would likely prompt political reconsideration of the question. A much less satisfactory alternative to exclusive federal jurisdiction, although one that might be somewhat less

abrasive politically, would be to split jurisdiction over the interprovincial and local aspects of telephone systems. The major problem with this alternative would lie in its extreme complexity, as U.S. experience with a two-tier approach has shown. Since the same telephone facilities are used to provide both local and interprovincial services, two-tier rate base regulation would require complex cost and plant separation procedures.

Another means of accomplishing the same end would be for the provincial and federal governments to transfer to a jointly constituted board the power to regulate the interprovincial activities of all Canadian carriers. While this would likely prove to be more palatable to the provincial governments, it would not address the need for a common industry strategy to be formulated and implemented by a single level of government.

With the ever-increasing importance of the telecommunications system to the Canadian economy and with the existing impediments to its orderly development posed by the current patchwork of regulatory jurisdictions, a change in the status quo must occur. Without the creation of an institutional infrastructure empowered to guide the development of the system, the goals of economic union will be seriously undermined.

Notes

This study was completed in December 1984.

1. *Constitution Act, 1867*, 30 & 31 Vict. c. 3.
2. *Re Regulation and Control of Radio Communications*, [1932] A.C. 304 (P.C.), at 315.
3. *C.P.R. v. Attorney-General for British Columbia*, [1950] A.C. 122 (P.C.).
4. *Ibid.*, at 142.
5. *A.-G. for Ontario v. Winner*, [1954] A.C. 541 (P.C.).
6. *Ibid.*, at 572.
7. *R. v. Ontario Labour Relations Board, Ex parte Northern Electric Co. Ltd.* (1970), 11 D.L.R. (3d) 640 (Ont. Co. Ct.), at 652; affirmed (1971), 14 D.L.R. (3d) 537 (Ont. C.A.).
8. *Supra*, note 5.
9. *Supra*, note 5.
10. *Supra*, note 5, at 580.
11. *Re Tank Truck Transportation Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.).
12. *Ibid.*, at 169.
13. *Ibid.*, at 172.
14. *Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd.* (1964), 46 D.L.R. (2d) 700 (Ont. H.C.).
15. *Ibid.*, at 702.
16. *Alberta Government Telephones v. Canadian Radio-television and Telecommunications Commission and CNCP Telecommunications*, Federal Court of Canada, Trial Division, Unreported No. T8340-82, October 26, 1984, p. 21.
17. *R. v. Manitoba Labour Board, Ex parte Invictus Ltd.* (1967), 65 D.L.R. (2d) 517.
18. *S.M.T. (Eastern) Ltd. v. Ruch*, [1940] 1 D.L.R. 190 (N.B.S.C.).
19. *Reference Re Industrial Relations and Disputes Investigation Act*, [1955] 3 D.L.R. 721 (S.C.C.).

20. *Ibid.*, p. 759.
21. *Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* (1973), 40 D.L.R. (3d) 105 (S.C.C.).
22. *Re Cannet Freight Cartage Ltd. and Teamsters Local 419* (1975), 60 D.L.R. (3d) 473 (F.C.A.).
23. *Luscar Collieries Ltd. v. McDonald et al.*, [1927] A.C. 925 (P.C.).
24. *Ibid.*, at 932.
25. *The Queen v. Board of Transport Commissioners* (1967), 65 D.L.R. (2d) 425 (S.C.C.).
26. *Ibid.*, at 432.
27. *City of Montreal v. Montreal Street Railway Company*, [1912] 1 D.L.R. 681 (P.C.).
28. *Ibid.*, at 683.
29. *C.P.R. v. Attorney-General for British Columbia*, [1950] A.C. 122 (P.C.). at 144.
30. *Toronto Corporation v. Bell Telephone Company of Canada*, [1905] A.C. 52 (P.C.).
31. *Ibid.*, at 59.
32. *Re Regulation and Control of Radio Communications*, [1932] A.C. 304 (P.C.), at 315.
33. *Ibid.*, at 314–15.
34. *Re Public Service Board v. Dionne et al.* (1977), 83 D.L.R. (3d) at 178.
35. *Ibid.*, at p. 181.
36. *Bell Canada Special Act*, S.C. 1880, c. 67, as amended, s. 4; *British Columbia Telephone Company Special Act*, S.C. 1916, c. 66, as amended, s. 2.
37. *Canadian National Railways Act*, R.S.C. 1970, c. C-10, as amended, s. 16.
38. *Consolidated Railway Act*, 1883, 46 Vict. c. 24, s. 6.
39. *A.-G. Ontario v. Canadian Temperance Federation*, [1946] A.C. 193 (P.C.).
40. *Johannesson v. West St. Paul*, [1957] 1 S.C.R. 292.
41. *Ibid.*, at 308–309.
42. *Re Orangeville Airport Ltd. and Town of Caledon* (1976), 11 O.R. (2d) 546 (Ont. C.A.).
43. *Ibid.*, at 549.
44. *Field Aviation Co. v. The Alberta Industrial Relations Board*, [1976] 6 W.W.R. 596 (Alta. A.D.).
45. *Re Colonial Coach Lines*, [1967] 2 O.R. 25 (Ont. H.C.).
46. *Murray Hill Limousine Service v. Batson*, [1965] B.R. 788 (Que. C.A.).
47. Subsec. 92(13) of the *Constitution Act, 1867*.
48. Subsec. 92(16) of the *Constitution Act, 1867*.
49. *A.-G. of Canada v. A.-G. of Ontario, Quebec and Nova Scotia*, [1898] A.C. 700 (P.C.).
50. *Reference Re Waters and Water-Powers*, [1929] S.C.R. 200.
51. *Pacquet v. Pilots Corporation (Quebec)*, [1920] A.C. 1029 (P.C.).
52. *Agence Maritime Inc. v. Canada Labour Relations Board* (1969), 12 D.L.R. (3d) 722 (S.C.C.).
53. *Reference Re Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529.
54. *Navigable Waters Protection Act*, R.S.C. 1970, c. N-8, as amended.
55. *National Harbours Board Act*, R.S.C. 1970, c. N-8, as amended.
56. *Canada Shipping Act*, R.S.C. 1970, c. S-9, as amended.
57. *National Transportation Act*, R.S.C. 1970, c. N-17, as amended.
58. *Pilotage Act*, S.C. 1970–71–72, c. 52, as amended.
59. *Shipping Conferences Exemption Act, 1979*, S.C. 1978–79, c. 2, as amended.
60. *St. Lawrence Seaway Authority Act*, R.S.C. 1970, c. S-1, as amended.
61. *Transport Act*, R.S.C. 1970, c. T-14, as amended.
62. *Canada Labour (Standards) Code*, R.S.C. 1970, c. L-1, as amended.
63. *Supra*, text at notes 39, 40.
64. *Aeronautics Act*, R.S.C. 1970, c. A-3, as amended.

65. *Supra*, note 57.
66. *Canadian National Railways Act*, R.S.C. 1970, c. C-10, as amended, s. 16; *Consolidated Railway Act*, 1883, 5.C. 46 Vict., c. 24, s. 6.
67. *Railway Act*, R.S.C. 1970, c. R-2, as amended.
68. *Supra*, note 66.
69. *Maritime Freight Rates Act*, R.S.C. 1970, c. M-3, as amended.
70. *Railway Relocation and Crossing Act*, S.C. 1974, c. 12, as amended.
71. *Western Grain Transportation Act*, 1980-81-82-83, c. 168, as amended.
72. *Supra*, text at notes 22-26.
73. *Supra*, text at notes 8-16.
74. *Motor Vehicle Transport Act*, R.S.C. 1970, c. M-14, as amended.
75. *Ibid.*, ss. 3, 4.
76. *Coughlin v. Ontario Highway Transport Board* (1968), 68 D.L.R. (2d) 384.
77. *A.-G. Nova Scotia v. A.-G. Canada*, [1951] S.C.R. 31.
78. *Supra*, note 76, at 387-88.
79. *National Transportation Act*, note 57, section 27.
80. *Public Commercial Vehicles Act*, R.S.O. 1980, c. 407, as amended subsec. 9(3).
81. *Campbell-Bennett Ltd. v. Comstock Midwestern Ltd. and Trans-Mountain Pipe Line Co.*, [1954] S.C.R. 207.
82. *National Energy Board Act*, R.S.C. 1970, c. N-6, as amended.
83. *Ibid.*
84. *British Columbia Power Corp. Ltd. v. A.-G. of British Columbia* (1963), 47 D.L.R. (2d) 633 (B.C.S.C.).
85. *Fulton et al. v. Energy Resources Conservation Board and Calgary Power Ltd.* (1981), 118 DLR (3d) 577 (SCC).
86. *Re Regulation and Control of Radio Communications*, [1932] A.C. 304 (P.C.), at 315.
87. *Supra*, note 86, at 342.
88. *Supra*, note 86, at 313-14.
89. *Supra*, note 86, at 315-16.
90. *Supra*, note 86, at 315.
91. *Capital Cities Communications Inc. v. Canadian Radio-television and Telecommunications Commission* (1977), 81 D.L.R. (3d) 609 (S.C.C.).
92. *Re Public Utilities Commission and Victoria Cablevision Ltd.* (1965), 51 D.L.R. (2d) 716 (B.C.A.A.).
93. *Re CFRB and A.-G. Canada*, [1973] 3 O.R. 819 (Ont. C.A.).
94. *Broadcasting Act*, R.S.C. 1970, c. B-11, as amended.
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96. *A.-G. Quebec v. Kellogg's Company of Canada* (1978), 83 D.L.R. (3d) 314 (S.C.C.).
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98. *Ibid.*, at 324.
99. *Canadian Radio-television and Telecommunications Commission Act*, S.C. 1974-75-76, c. 49, as amended.
100. *Radio Act*, R.S.C. 1970, c. R-1, as amended.
101. *Supra*, text at notes 30-31.
102. *Supra*, note 31.
103. *Supra*, note 99.
104. *Supra*, note 36.
105. *Supra*, note 37.
106. *Telesat Canada Act*, R.S.C. 1970, c. T-4, as amended.
107. *Canadian Pacific Limited Special Act*, S.C. 1881, c. 1, as amended, s. 22.

108. Telecom Canada, *Statistics 1982*.
109. *Teleglobe Canada Act*, R.S.C. 1970, c. C-11, as amended.
110. "edmonton telephones" is owned and operated by the City of Edmonton pursuant to the *Municipal Government Act*, R.S.A. 1980, c. M-26, as amended; and the *Municipal Telephone Act*, R.S.A. 1955, c. 218, as amended.
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115. *The Queen in Right of Alberta v. Canadian Transport Commission* (1977), 75 D.L.R. (3d) 257 (S.C.C.).
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- the Attachment of Subscriber-Provided Terminal Equipment*, Telecom Decision CRTC 81-19, October 22, 1981.
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 165. *Re Garden of the Gulf Court & Motel Inc. and Island Telephone Co. Ltd.* (1981), 126 (D.L.R. (3d) 281 (P.E.I. S.C.)).
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 167. Ontario Telephone Service Commission, Order 4276, December 15, 1983.
 168. Régie des services publics du Québec, ordinance générale no. 36, January 31, 1983.
 169. Provincially regulated carriers in Saskatchewan, Manitoba, New Brunswick and Newfoundland all have restrictions on the attachment of subscriber-provided terminal equipment, as does 'edmonton telephones.'
 170. Terminal Attachment Program Advisory Committee technical standards.
 171. For example, in Alberta, the Public Utilities Board has approved terms and conditions which permit AGT to apply to modify the TAPAC technical standards where local conditions require.
 172. Saskatchewan, Manitoba, New Brunswick and part of Newfoundland.
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 174. *Colins v. Bell Canada*, Telecom Decision CRTC 79-12, June 7, 1979; CRTC 79-14, July 26, 1979; CRTC 80-16, August 29, 1980; and CRTC 81-1, January 12, 1981.
 175. For example, Alberta Government Telephones, Maritime Telegraph and Telephone Company, and Newfoundland Telephone Company all have tariffs for the provision of dial access to independent radio paging networks.
 176. *Cellular Mobile Radio Policy and Call for Licence Applications*, Notice No. DGTN-006-82, October 1982.
 177. Calgary, Alta.; Chicoutimi-Jonquière, Quebec; Edmonton, Alberta; Halifax, Nova Scotia; Hamilton, Ontario; Kitchener, Ontario; London, Ontario; Montreal, Quebec; Oshawa, Ontario; Ottawa-Hull, Ontario; Quebec, Quebec; Regina, Saskatchewan; Saint John, N.B.; Saskatoon, Sask.; St. Catharines-Niagara, Ontario; St. John's, Nfld.; Sudbury, Ontario; Thunder Bay, Ontario; Toronto, Ontario; Vancouver, B.C.; Victoria, B.C.; Windsor, Ontario; Winnipeg, Manitoba.
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203. *Ibid.*, paras. 1–2.
204. *Ibid.*, para. 3.
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208. *Supra*, note 186, at 123–24.
209. *Supra*, note 189, at 112.
210. *Ibid.*
211. *Supra*, note 195, at paras. 1 and 2.
212. *Supra*, note 195, at para. 1.
213. *Supra*, note 202, paras. 1, 2 and 4(c).
214. *Supra*, note 195, at para. 4(a).
215. *Supra*, note 202, para. 4(e).
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Fisheries, Harmonization and the Economic Union

BRUCE H. WILDSMITH

Fisheries: Functional Components and Constitutional Connections

Introduction

Section 91(12) of the *Constitution Act, 1867* gives exclusive legislative jurisdiction over seacoast and inland fisheries to the federal government. This mandate is carried out by the federal Department of Fisheries and Oceans (DFO). Nowhere do the *Constitution Acts, 1867 to 1982* refer to a provincial power to deal with fisheries. Despite the seemingly wide, plenary and exclusive power given to Parliament, provincial legislatures have set up governmental structures to carry out a provincial role in relation to fisheries. Often, as with the coastal provinces (B.C., Nfld., N.S., P.E.I., N.B. and Quebec), they have constituted government departments with fisheries as their sole or central responsibility. Why do the provinces spend their rather limited resources this way? The obvious answer is because aspects of the fishery vitally affect provincial interests. What are those interests? Where does the federal fisheries power end and that of the provincial heads of jurisdiction begin? These complicated questions are approached by breaking the activities embraced by fisheries along functional lines and noting a variety of distinctions commonly employed by fisheries managers and analysts.

First, it should be appreciated that there is not one fishery but many, not one type of participant but many and, similarly, not just one way of participating but many. While great attention has, properly, been directed to the commercial fishery, there is also, for some of the same species, such as Atlantic and Pacific salmon, a recreational and an Indian-Inuit fishery. Within the commercial fishery there are offshore, inshore and

midshore fleets. There are various species (e.g., cod, haddock) and stocks (e.g., Northern Cod, Scotian Shelf Cod), often intermixed, some valuable for food, others for meals and others of commercial interest only to foreign fishermen. There is, finally, a host of fishing techniques, some using mobile gear (e.g., trawls and seines) and others using fixed gear (e.g., trap nets and lobster pots). The attempt to address all of these complexities in the fisheries has made it one of the most regulated industries in Canada.

One of the more useful ways of looking at the commercial fishery is in terms of three distinct activities: harvesting, processing and marketing. While I will discuss each activity separately, breaking them into finer and finer divisions, it should be appreciated that all interconnect. Thus, one cannot market unless the product has been harvested; how much and when you should market should influence how much one harvests;¹ and how much one harvest may affect what is done by way of marketing. Similarly, most fish is processed in some way, and one must harvest to be able to process. What is processed must be marketed, and what you market you must be able to process. Again, once you have capitalized to harvest, you must harvest and market to meet your investment. Indeed, it should be observed that it is these webs of dependencies, and others, that make fisheries issues complex and uncoordinated activities wasteful.

Harvesting

The term “harvesting” refers to the capture of fish found at large in the wild. This may be done in fresh (non-tidal) or marine (tidal) waters, or in estuarine areas where fresh and salt waters mix (tidal). The “fish” which are captured may be traditional marine fin fish, such as cod and haddock or anadromous fin fish which spawn and spend their juvenile years in fresh water but forage and mature in the oceans (and Great Lakes), such as the Atlantic salmon, the five species of Pacific salmon and rainbow trout. “Fish” may be sedentary or bottom-dwelling molluscs and crustaceans such as clams, mussels, and oysters, lobsters and crab. They may be marine mammals, primarily seals and whales and, as far as the interpretation of the “fisheries” power embodied in the federal *Fisheries Act*² is concerned, marine plants as well.

Commercial harvesting techniques are usually viewed as taking two basic forms depending on the type of gear used — mobile or fixed. As the name suggests, mobile gear is moved through the water, the fisherman essentially coming to the fish, as in seine and trawl fishing, trolling and scallop dragging. Fixed gear, on the contrary, is placed in a location with some connection to the bottom or shore, relying upon the fish coming to it, as with trap and gill nets, longlines, weirs, and lobster and crab pots. Some techniques do not fit neatly into this category, such as the use of floating gill nets, which may drift on the open ocean. A key

distinction, however, is whether or not the technique utilizes land, subaquatic or otherwise.

Likewise, it is common to divide the commercial fishery according to the size of the vessels engaged in it. The Atlantic Groundfish Management Plans, which have been developed annually since 1976, tend to classify a vessel/fishery as inshore (vessels under 65'), midshore (65'–100') and offshore (vessels over 100'). Obviously, it is expected that a vessel's size will reflect how far and for how long it will venture from its home port.

Fisheries management attempts to conserve the fisheries resource. This is done, with some uncertainty, by identifying stocks (i.e., groupings of fish of a particular species that are more or less distinct from other fish of the same species) and interdependencies, and then setting a total allowable catch (TAC) for each such grouping. The Atlantic coast has been split into a variety of divisions for management purposes by the *Territorial Sea and Fishing Zones Act*,³ corresponding closely to divisions originally created by the International Convention for the Northwest Atlantic Fishery. Within each division, TACs are set for each species. The above-mentioned distinctions, i.e., size of vessel, type of gear, are then used to divide, in general, the totals for each such species into totals for each such gear type and vessel size. Lately, DFO has made specific allocations to named vessels and named companies. Indeed, Recommendation 7 of the Task Force on Atlantic Fisheries in its December 1982 report (the "Kirby Report") maintained that licences should be issued to individuals as quasi-property rights, specifying a quota or enterprise allocation for that licensee (or catching capacity) and that the licences should be divisible and transferable. Thus, the harvesting of the fisheries resource is federally managed by a technique which has an allocational component as well as a conservation component. The provinces are consulted and through an extensive system of advisory bodies, they and user groups have input into management decisions.

The provincial concern with respect to harvesting stems from two factors: the harvesting may take place "in the province" (this raises the question of how far into tidal waters provincial boundaries extend) and also the vessels are based, the crews reside and the fish are landed in the province. The provincial boundaries question has implications as to whose resource the fishery is. The land-based components of the fishery directly affect provincial social, economic and, indeed, cultural interests. Decisions concerning the allocation of the fisheries resource vitally affect the land-based components of the harvesting sector. This fact is central to the balance of this paper.

Processing

The processing sector in Canada is predominantly land-based. With

limited exceptions, the factory/freezer vessels used by the distant-water fishing fleets of other nations have generally been viewed as unnecessary and undesirable in Canada. Processing, beyond gutting and icing, is done onshore within the provinces. Fishermen generally bring their catches to the processor who may fillet, freeze, can, cook or otherwise prepare the product for market. The province is obviously concerned about the processor, since he occupies provincial land space, needs servicing, employs residents, supports other commercial/industrial activities, pays taxes, provides a market for local fishermen, adds value to the fish landed, supplies food locally (diminishing the need for imports), and brings money into the province from the extra-provincial sale of fish products.

The central problem for the processor is continuity of supply. He must have sufficient capacity, in both capital equipment and labour, to meet peaks in demand, while at the same time avoiding over-capitalization in order to keep costs down when supply and demand upon him are low. Fishing and fish supply tend to be seasonal; market demand tends to be more even and continuous. To the extent that it can be done, the provinces would like to see an even flow of fish to the processor; the peaks need to be levelled. Control over supply to the processor is, however, greatly influenced — indeed controlled — by federal management decisions.

Marketing

Marketing is the component of the fishing industry furthest removed from the fish in the water. It is vital that whatever is taken from the water eventually be sold. If it is not, both the resource and the investment that went into its harvesting and processing are wasted; one might as well not fish. Indeed, marketing has been identified as perhaps the central problem in the Canadian fishing industry.⁴ Witness the large unsold inventories of the recently restructured major fishing companies on the East Coast as a significant factor in their financial problems.

The courts have consistently taken the view that the federal fisheries' power does not include fish as a product of trade; they have equally consistently held that local trade is a provincial matter, while international and interprovincial trade is a federal matter embraced by Parliament's power over the regulation of trade and commerce. Thus the federal government is concerned about the marketing of fish products as guardian of the Canadian economic union and of Canada's position as a world trading nation. The provinces are concerned about fish marketing as a local phenomenon and additionally, as a source of revenue brought into the province.

Aquaculture

Aquaculture is the culture or husbandry of aquatic plants and animals. It is to fishing as farming is to hunting and gathering. Furthermore, like agriculture at the time of the decline of reliance on hunting and gathering, aquaculture today lacks the sophistication and development that it will undoubtedly attain in the years ahead. It is the wave of the future for the fishing industry. As the costs of pursuit and capture increase and as the level of exploitation of wild stocks reaches its peak, any new gains on the supply side for fishery products will have to come from the more intensive husbandry offered by aquaculture.

Aquaculture resembles fishing in that the organisms involved are the same, i.e., fin fish, shellfish, crustaceans and plants, and both are raised in water, as opposed to on land, but there the resemblance ends. Instead of allowing nature to take its course, the culturist intervenes, as does any farmer, to manipulate the organism (breeding and genetics) and its environment (feed, water quality, disease protection). Money is spent to raise a crop, rather than to hunt wild organisms, and this factor means that the property interest of the culturist must be secure. In other words, the fish or cultured organism must be the subject of private property. Unlike those engaged in the wild fishery, the culturist must own his crop and have it secure from harvest by others. This raises the question of how, constitutionally, aquaculture ought to be treated.

Elsewhere, I have argued that aquaculture probably should be viewed as primarily a provincial activity.⁵ This stems from viewing aquaculture as a local business or trade whose central feature is private property rather than fisheries. The fact that the crop is fish, I contend, does not make it part of seacoast and inland fisheries. Constitutionally the cultured fish should be viewed as private property; "fisheries" as a subject of legislative power should be confined to the wild fishery. Since disease and parasites travel easily through water and may be transferred from cultured stock to wild, federal control of fish health should be viewed as equally applicable to cultured organisms. Other ways in which a federal role will be played in aquaculture are through Parliament's jurisdiction over shipping and navigation (controlling the location of pens and rafts), federal public lands (public harbours, national parks, the Yukon and Northwest Territories) and, perhaps, the offshore.

The Fisheries Power

The exclusive jurisdiction given to the federal government by s. 91(12) of the *Constitution Act, 1867* to legislate in relation to seacoast and inland fisheries has been interpreted by the courts to relate to the protection, conservation, enhancement and policing of both the freshwater and tidal

fisheries. This exclusive power must be contrasted, however, with the provincial powers over property and civil rights (s. 92(13)) and local matters (s. 92(16)). While Parliament may deal with the fisheries as a resource and fishing as an activity impacting upon that resource, the federal government does not own the fishing rights nor, does it seem, the fish themselves.

The locus classicus for cases on the fisheries power is the 1882 Supreme Court decision in *The Queen v. Robertson*.⁶ The background to the case involved a conflict over fishing rights for Atlantic salmon in a non-tidal, non-navigable portion of the Miramichi River in New Brunswick. One claimant asserted rights based on land ownership; the other, Robertson, held a lease from the federal minister of marine and fisheries acting pursuant to the *Fisheries Act* (Canada). At common law the right to fish in non-tidal waters is a property right called a *profit à prendre*, attached to ownership of the bed of the watercourse. Chief Justice Ritchie, with whom Henry, J. agreed, dealt with the federal fisheries power in these words (pp. 120–21):

. . . I am of opinion that the legislation in regard to “Inland and Sea Fisheries” contemplated by the *British North America Act* was not in reference to “property and civil rights” — that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large, who are interested in the fisheries as a source of national or provincial wealth; in other words, laws in relation to the fisheries, such as those which the local legislatures were, previously to and at the time of confederation, in the habit of enacting for their regulation, preservation and protection, with which the property in the fish or the right to take the fish out of the water to be appropriated to the party so taking the fish has nothing whatever to do, the property in the fishing, or the right to take the fish, being as much the property of the province or the individual, as the dry land or the land covered with water. I cannot discover the slightest trace of an intention on the part of the Imperial Parliament to convey to the Dominion Government any property in the beds of streams or in the fisheries incident to the ownership thereof, whether belonging at the date of confederation either to the provinces or individuals, or to confer on the Dominion Parliament the right to appropriate or dispose of them, and receive therefor large rentals which most unequivocally proceed from property, or from the incidents of property in or to which the Dominion has no shadow of claim; but, on the contrary, I find all the property it was intended to vest in the Dominion specifically set forth. Nor can I discover the most remote indication of an intent to deprive either the provinces or the individuals of their proprietary rights in their respective

properties; or in other words, that it was intended that the lands and their incidents should be separated and the lands continue to belong to the provinces and the Crown grantees, and the incidental right of fishing should belong to the Dominion, or be at its disposal.

And later (pp. 123–24), he stated:

To all general laws passed by the Dominion of Canada regulating “sea coast and inland fisheries” all must submit, but such laws must not conflict or compete with the legislative power of the local legislatures over property and civil rights beyond what may be necessary for legislating generally and effectually for the regulation, protection and preservation of the fisheries in the interests of the public at large. Therefore, while the local legislatures have no right to pass any laws interfering with the regulation and protection of the fisheries, as they might have passed before confederation, they, in my opinion, clearly have a right to pass any laws affecting the property in those fisheries, or the transfer or transmission of such property under the power conferred on them to deal with property and civil rights in the province, inasmuch as such laws need have no connection or interference with the right of the Dominion Parliament to deal with the regulation and protection of the fisheries, a matter wholly separate and distinct from the property in the fisheries. By which means the general jurisdiction over the fisheries is secured to the parliament of the Dominion, whereby they are enabled to pass all laws necessary for their preservation and protection, this being the only matter of general public interest in which the whole Dominion is interested in connection with river fisheries in fresh water, non-tidal rivers or streams, such as that now being considered, while at the same time exclusive jurisdiction over property and civil rights in such fisheries is preserved to the provincial legislatures, thus satisfactorily, to my mind, reconciling the powers of both legislatures without infringing on either.

Similarly, Mr. Justice Strong stated (pp. 134–35):

I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression “Inland Fisheries,” conferred upon parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word “property,” can only be interfered with by the provincial legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding, prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries. Again, under this provision parliament may enact laws for regulating and restricting the right of fishing in the waters belonging to the Dominion, such as public

harbors, the beds of which have been lately determined by this court to be vested in the Crown in right of the Dominion, and also for regulating the public inland fisheries of the Dominion, such as those of the great lakes and possibly also those of navigable non-tidal rivers. There is therefore no unreasonable restriction of the power of parliament in construing the twelfth sub-section as I do, as not including a power to legislate concerning the right of property in private fisheries.

That legislative power is distinct from property rights was made clear a few years later by the Privy Council in the *Ontario Fisheries Reference*.⁷ There Lord Herschell noted in another classic statement (p. 709):

It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it.

He then went on to state (p. 712) that s. 91 “did not convey to the Dominion of Canada any proprietary rights in relation to fisheries,” although it does allow it to affect proprietary rights, such as by prescribing when fishing may take place or what implements may be used.

The same case also confirms the contrary proposition: the fact that a province owns its freshwater fishery resource does not allow it to legislate for its protection. This Ontario had attempted through an 1892 statute titled “An Act for the Protection of the Provincial Fisheries.” The Supreme Court had upheld this power as concurrent,⁸ but the Privy Council overturned this view, noting (p. 716), that “. . . the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures.”

In tidal waters, the fishery is not regarded as subject to proprietary or exclusive fishing rights; a public right to fish exists. This is based upon the state of law at Confederation when, because of the Magna Charta in 1215, no exclusive or several right to fish could be granted by the Crown in the common law colonies. The same public right to fish existed in Quebec at Confederation as a result of pre-Confederation colonial statutes.⁹ In the *B.C. Fisheries Reference*¹⁰ the competence of the province to create a private right to fish in tidal waters arose. In eschewing any such provincial right, Viscount Haldane stated (pp. 172–73):

Neither in 1867 nor at the date when British Columbia became a member of the Federation was fishing in tidal waters a matter of property. It was a right open equally to all the public, and therefore, when by s. 91 sea coast and inland fisheries were placed under the exclusive legislative authority of the Dominion Parliament, there was in the case of the fishing in tidal waters

nothing left within the domain of the Provincial Legislature. The right being a public one, all that could be done was to regulate its exercise, and the exclusive power of regulation was placed in the Dominion Parliament. Taking this in connection with the similar provision with regard to "navigation and shipping" their Lordships have no doubt that the object and the effect of these legislative provisions were to place the management and protection of the cognate public rights of navigation and fishing in the sea and tidal waters exclusively in the Dominion Parliament, and to leave to the Province no right of property or control in them. It was most natural that this should be done, seeing that these rights are the rights of the public in general and in no way special to the inhabitants of the Province.

The suggestion in the last sentence is that the public right to fish in tidal waters is the right of all Canadians and not only of the residents of any particular province.

Some methods of fishing make use of the shore or seabed of tidal waters. Their Lordships clarified in the B.C. case that the provinces, to the extent that such areas are within the provinces, have proprietary rights that must be respected. They state (p. 171):

It will, of course, be understood that in speaking of this public right of fishing in tidal waters their Lordships do not refer in any way to fishing by kiddles, weirs, or other engines fixed to the soil. Such methods of fishing involve a use of the solum which, according to English law, cannot be vested in the public; but must belong either to the Crown or to some private owner.

The same point is made in the *Quebec Fisheries Reference*¹¹ (pp. 428 and 431), the latter stated in these words:

In so far as the soil is vested in the Crown in right of the Province, the Government of the Province has exclusive power to grant the right to affix engines to the solum, so far as such engines and the affixing of them do not interfere with the right of the public to fish, or prevent the regulation of the right of fishing by private persons without the aid of such engines.

The next important issue relating to the fisheries power to be decided by the courts related to the power over the fish once harvested from the sea. The *B.C. Fish Canneries Reference*¹² concerned the power of Parliament to require that fish canneries be federally licensed. As Lord Tomlin put the issue (p. 120), the appellant sought for the word "fisheries" in "sea coast and inland fisheries, a definition of such amplitude that it will include the operations carried out upon the fish when caught for the purpose of converting them into some form of marketable commodity." In holding this contention not well founded, he states (p. 121):

In their Lordships' judgment, trade processes by which fish when caught are converted into a commodity suitable to be placed upon the market cannot upon any reasonable principle of construction be brought within the scope of the subject expressed by the words "sea coast and inland fisheries."

Note that, in a recent similar situation, a B.C. county court judge upheld in *R. v. Bodmer*¹³ a provision in the *Pacific Fishing Registration and Licensing Regulations* requiring fish-packing vessels to have federally issued commercial fishing tabs on their registration plates. He seemed to feel, incorrectly in my view, that the fish had not become "a commodity" because nothing had been done to them except to remove them from the hold of a fishing vessel and place them in the hold of the fish packer. More telling, in my view, would be the fact that the fish had been reduced to possession and had become the subject of private property rights and therefore a suitable subject for private trading arrangements.

The last important component of the fisheries power to feature in litigation is that of habitat and water quality protection. The courts have demonstrated that those forms of environmental protection linked to the health of fish are properly regarded as within the federal fisheries power. In 1980, the Supreme Court of Canada tackled the issue in two cases. The first, *R.v. Fowler*¹⁴ involved a charge under s. 33(3) of the *Fisheries Act*: this section basically forbids anyone "engaged in logging, lumbering, land clearing or other operations" from putting or knowingly permitting to be put "any slash, stumps or other debris into any water frequented by fish." Mr.Fowler had, in the course of his logging operation, dragged logs with a caterpillar tractor across a small stream which was only a few feet wide and had no name. Debris consisting of limbs, branches and tops of trees was deposited in the stream. There was no evidence that the deposit of the debris affected or injured the fish or the fry in any way, although damage to the eggs in the gravel and increased biological oxygen demand were mentioned as possibilities. Martland, J., writing for the Court, in striking down s. 33(3) as unconstitutional, stated (p. 243):

Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal parliament.

It seems clear that if the Court had believed there was a link between the activities proscribed and harm to the fisheries, it would have upheld the provision as being within the fisheries power.

In the second of its 1980 decisions, the Supreme Court was, as well, faced with the question of linkage. In *R.v. Northwest Falling Contractors Ltd.*¹⁵ the provision constitutionally challenged was s. 33(2), which basically prohibits anyone from depositing or permitting "the deposit of a deleterious substance of any type in water frequented by fish. . . ." "Deleterious substance" is defined in s. 33(11) to mean, in part:

(a) any substance that, if added to any water, would degrade or alter or form part of a process of degradation or alteration of the quality of that water so that it is rendered or is likely to be rendered deleterious to fish or fish habitat or to the use by man of fish that frequent that water. . . .

In this case, the defendant was responsible for the discharge of 3,000 gallons of diesel fuel into a particular tidal inlet when a rotten log, on which four fuel tanks rested, broke, causing a pipe on the bottom of one tank to rupture. Martland, J. again wrote the court's decision. He said (p. 550):

It is necessary to decide whether the subsection is aimed at the protection and preservation of fisheries. In my opinion it is.

He then distinguishes *Fowler, supra*, by stating:

Unlike subsection (2), subsection (3) contains no reference to deleterious substances. It is not restricted by its own terms to activities that are harmful to fish or fish habitat.

Martland, J. finally concludes (pp. 550–51):

In my opinion, subsection 33(2) was *intra vires* of the Parliament of Canada to enact. The definition of “deleterious substance” ensures that the scope of subsection 33(2) is restricted to a prohibition of deposits that threaten fish, fish habitat or the use of fish by man.

One final case on habitat protection might be mentioned: *A.-G. Can. v. Aluminum Co. of Canada Ltd.*,¹⁶ a decision of the British Columbia Supreme Court. The issue involved was an order by the federal minister of fisheries requiring Alcan to discharge waters from its dam at the rate of 8,000 cubic feet per second, rather than 600 as it had been doing, on the basis that this was required to protect spawning salmon. The minister received the power to make this order by virtue of s. 20(10) of the *Fisheries Act*. In the course of interlocutory proceedings to compel compliance with the ministerial order, Berger, J. granted such a mandatory injunction, in essence holding s. 20(10) and the order *prima facie* constitutional.

These, then, are the broad lines drawn by the courts around the federal fisheries power. All matters relating to the health of fish stocks, including their habitat, and the regulation of the public right to fish in tidal waters are encompassed in Parliament's mandate; proprietary rights in non-tidal fisheries and in the fish after being landed are not. As in most areas of law, unanswered questions still exist. With respect to the fisheries power, two such of current concern relate to, first, the ability of the federal government to turn the public right to fish in tidal waters into a private, proprietary fishery, and second, the extent to which the fisheries mandate permits management for goals unrelated to the health of the fish stocks, such as the distribution of wealth and the promotion of social values. The first theme will be treated later in the section entitled

“Possible Economic Consequences.” One of the advantages of the proposals to be outlined later is that they allow the provinces to create proprietary rights and deal with distribution and social welfare, thus finessing both possible problems.

Fisheries in Other Economic Unions

Fish are distributed globally, and in most parts of the world they constitute an important natural resource, whether viewed commercially or recreationally. It is potentially instructive, therefore, to examine the manner of handling fisheries in jurisdictions having some analogy to Canada's situation. With this in mind, two federal states, namely, Australia and the United States, and a less integrated but important economic union, the European Economic Community (EEC), are examined.

Australia

Australia is composed of a central government (usually referred to as the Commonwealth), six states and several territories (the principal one being the Northern Territory). It is federally united under the *Commonwealth of Australia Constitution Act* which, unlike Canada's Constitution, leaves the residuary power with the states. The Commonwealth, like the federal government in Canada, has plenary jurisdiction over the territories, including fisheries both within and without the territorial seas adjacent to those territories.

Section 51(x) empowers the Commonwealth Parliament to make “laws for the peace, order, and good government of the Commonwealth with respect to: (x) Fisheries in Australian waters beyond territorial limits.” This power is the only express reference to fisheries in the constitution. It seems, on face value, to confer upon the Commonwealth legislative power over fisheries beyond the limits of the territorial seas, presumably as understood in 1900, at the time of confederation. By implication, it suggests that the states would have fisheries jurisdiction within those limits which would, if correct, include both the freshwater fisheries and the inshore component of the tidal fishery. Indeed, as recently as 1969, in *Bonser v. La Macchia*,¹⁷ the Australian High Court held that parliament derived no power from s. 51(x) to enact laws with respect to fisheries within three nautical miles of the coast of a state.

In December 1975, however, the Australian High Court handed down its decision in *New South Wales v. The Commonwealth*,¹⁸ a case in which the states challenged the federally enacted *Seas and Submerged Lands Act, 1973*. In the course of its judgment, the High Court ruled that the Commonwealth had complete jurisdiction over the area from the coastal low watermark to three nautical miles seaward. This appears to be based on the view that at common law the realm, and a fortiori the Australian

colonies at confederation, ended at the low watermark. Insofar as international treaties and law in general recognized a broader jurisdiction than the low watermark, this belonged, in the High Court's view, to the Commonwealth as a result of its constitutional power over "external affairs" (s. 51(xxix)). One consequence of the decision was to raise questions about the jurisdiction of the states to control fisheries seaward of the low watermark, since this area runs outside the territorial limits of the states; freshwater and tidal fisheries landward of the base line for the territorial sea would admittedly continue under state jurisdiction.

Further grist for the constitutional analysis of fisheries jurisdiction in the territorial seas was not long in coming. *Pearce v. Florenca*¹⁹ involved a charge of illegal possession of undersized rock lobsters at a point one-and-a-half miles off the coast of Western Australia, contrary to the *Fisheries Act, 1905-1975* of Western Australia. Did such a state law apply in this area, one beyond, as the New South Wales case informed us, the territorial limits of the state of Western Australia? The High Court said that state law did in fact apply. The reason, as expressed by Chief Justice Barwick (p. 512), was that "the state has legislative power to make laws which touch and concern the peace, order and good government of Western Australia which are operative beyond the margins of the territory of Western Australia, and thus operative in areas of the sea not limited to the marginal seas commonly described as 'territorial waters'." In short, the states still retain extra-territorial legislative competence.

The questions left unanswered to date by this analysis largely surround the possible exercise of Commonwealth legislative jurisdiction in the territorial seas in relation to fisheries. In the *Pearce* case the judges examined the *Seas and Submerged Lands Act* for possible conflict with Western Australia's fisheries law and found none. Presumably, however, it is open to the Commonwealth to use its external affairs power to enact fisheries laws applying in the same areas as those of the states, thus causing confusion and, to the extent at least of any conflict, pre-empting state fisheries control. If this is so, a possible consequence would be to place virtually the entire tidal fishery under the control of the Commonwealth.

The furor caused by the New South Wales decision and issues of offshore jurisdiction sent the federal government and the states searching for a comprehensive offshore constitutional settlement. In the course of these negotiations, new fishing arrangements were agreed to and legislation enacting the fishery arrangements has now been passed, although it has not yet been put into effect. The legislation to implement the offshore constitutional settlement, we are told, "came into operation on February 14, 1984 but is presently not being put into effect pending the review of Australia's offshore sovereignty by present government."²⁰ In essence, the legislation enacted by the Commonwealth, the

*Fisheries Amendment Act, 1980*²¹ (reciprocal legislation is required from each state) would give the states and the Northern Territory control over fisheries from the low watermark to three nautical miles seaward. The 1980 act introduces s. 4A to the *Fisheries Act, 1952*, which states that for the purposes of the *Fisheries Act, 1952*, "the coastal waters of a State or internal Territory are — (a) that part or parts of the territorial sea of Australia that is or are adjacent to that State or Territory . . ." as well as tidal waters landward of the territorial sea. Section 4A(2) makes it clear that only three nautical miles are included and not any extended territorial sea, i.e., not the new 12-mile limit recognized by international law.

Australia has in fact proclaimed a 200-nautical-mile Australian Fishing Zone. This was accomplished by the *Fisheries Amendment Act, 1978*, and results in the Commonwealth assuming jurisdiction over this prime fishery area. Thus, once the present constitutional settlement is implemented, fisheries from the base line to the three-mile limit will be under state law (barring further arrangements authorized by the *Fisheries Amendment Act, 1980*, discussed later), while those operating from the three-mile to the two-hundred-mile limit will again be under Commonwealth law, in the absence of any new agreement.

In 1982 the Australian Senate Standing Committee on Trade and Commerce published its report, *Development of The Australian Fishing Industry*. The committee noted (p. 44):

[T]he States and the Northern Territory also have a significant role and responsibility as industry is based in and operates out of ports within State and Territory boundaries and under State and Northern Territory jurisdictions. Effective co-operation between the States, the Northern Territory and the Commonwealth is therefore necessary for the successful operation of the industry.

The emphasis on cooperation as a requisite for industrial development is a common Australian theme. Before 1960, most Australian fishing activities took place within sight of land and were controlled by the adjacent state. As the industry moved offshore, the Commonwealth began to play a larger role, and mechanisms were introduced to promote cooperation between governments and to coordinate management decisions. The major group is the Australian Fisheries Council, set up in 1968. It is a ministerial council chaired by the Commonwealth minister for primary industry and includes the Commonwealth minister for science and technology, and the state and Northern Territory ministers responsible for fisheries matters. The council's mandate is to act as a forum for Commonwealth-state consultation and cooperation and to promote the welfare and development of the Australian fishing industry generally. Its role is consultative only; it meets annually, and its resolutions are tabled in the federal Parliament. Advice is received by the council from the

standing committee on fisheries, which is comprised of officers in the various fisheries-related government departments. There are, as well, three regional committees which direct recommendations to the standing committee on fisheries. It should be noted that the Senate Standing Committee on Trade and Commerce in its 1982 report appeared to regard these cooperative mechanisms as less than fully effective. This seems to be reflected in a diversity of fisheries regulations between the Commonwealth, the states and the Northern Territory and in continuing conflict between regional and national interests. The committee refers to division and conflict between states, and between the Commonwealth and states, and notes that the advisory committees have failed to present adequately the views of the private sector. The committee recommended a uniform national system of fisheries regulation and that emphasis be given to fisheries management policies that transcend state and Northern Territory interests.

The proposed Australian fisheries jurisdiction settlement evidenced by the not-yet-in-force *Fisheries Amendment Act, 1980* continues this theme of cooperation and consultation. It passes beyond the simple creation of a three-mile dividing line between state/Commonwealth jurisdictions to deal with mechanisms to handle fisheries that do not respect state/Commonwealth or state/state boundaries. The two mechanisms proposed to deal with overlapping fisheries are joint authorities and delegation. The act proposes creating four fisheries joint authorities — one for the States of the Southeast, one for Northern Australia, one for the Northern Territory and the last for Western Australia — with power to make arrangements with a state or states for other joint authorities to be established. As the name suggests, the joint authorities are made up of representatives, in all cases government ministers, of the concerned jurisdictions. Thus, the Southeastern Fisheries Joint Authority would consist of “the Commonwealth Minister together with the appropriate Ministers of New South Wales, Victoria, South Australia and Tasmania.” Each joint authority includes the Commonwealth minister; the Northern Australian includes Queensland and the Northern Territory, the Northern Territory the appropriate minister of that Territory, and the Western Australian that of Western Australia. Joint authorities may delegate their duties to others; they may appoint advisory committees. Generally, meetings are chaired by the Commonwealth representative. Of significance is s. 12F(4):

12F(4) If, at a meeting of a Joint Authority, the members present are not agreed as to the decision to be made on a matter, the Commonwealth Minister may, subject to sub-section (5) [mandatory submission for consideration to, but not decision making by, the Australian Fisheries Council], decide that matter and his decision shall have effect as the decision of the Joint Authority.

While the creation of each joint authority is expressed as mandatory, the submission of a particular fishery to its control is not. Thus, s. 12H(1) states:

12H(1) The Commonwealth may make an arrangement with the State or States that is or are represented on a Joint Authority that the Joint Authority is to have the management of a particular fishery in waters adjacent to that State or to those States or any of those States.

If only one state is involved, the actual law applying can be specified as the law of that state or of the Commonwealth; if more than one state, then the law must be that of the Commonwealth. Ministerial powers and licensing are done by the joint authority.

Even though a joint authority arrangement has not been made, the Commonwealth and a state may, under s. 12H(4),

Make an arrangement with a State with respect to a particular fishery in waters adjacent to the State . . .

- (a) that the fishery (being a fishery wholly or partly in the coastal waters of the State) is to be managed in accordance with the law of the Commonwealth; or
- (b) that the fishery (being a fishery wholly or partly in waters on the seaward side of the coastal waters of the State) is to be managed in accordance with the law of the State.

Thus, even if the appropriate authorities feel disinclined to use the joint authority approach, a fishery overlapping the three-mile limit can be managed by one concerned level of government or the other through the mechanism of delegation. Both the joint authority and delegation mechanisms may be terminated on six months' notice.

The Senate Standing Committee on Trade and Commerce commented in *Development of the Australian Fishing Industry* on the joint authorities approach. It suggested (p. 51) that problems will arise as to which fisheries should be assigned to joint authority management, which should be managed solely by states, and which should continue under present arrangements. There is, apparently, already some difference of opinion between the states as to which fisheries should come under the joint authorities. There is concern as to how the new mechanisms will fit into the old. The committee also "agrees that the present formal consultative structure together with the advisory bodies which may be established when the new fisheries management arrangements are implemented could operate as a formidable bureaucratic barrier which might further weaken industry's ability to participate in fisheries management. The Committee believes that governments should develop consultative and administrative frameworks which facilitate industry participation rather than obstruct it" (p. 52). Later in the report the

committee recommends Commonwealth legislation “providing for the establishment of a national statutory fisheries authority which will provide a formal framework for co-operation between government and industry in the formulation of fisheries policy and all aspects of fisheries management” (p. 68).

More fundamentally, the committee attacked the joint authorities mechanism as an unfortunate “administrative approach established on the basis of regional interests and political considerations rather than a biological approach directed towards the management of particular species” (pp. 52–53). The committee referred to management and protection through “specialist bodies” and felt that it “might be more appropriate to manage fisheries resources on a species basis rather than on the basis of State and Territory boundaries and interests, a method of control practised successfully elsewhere in the world” (p. 53). In support of this view the committee later recommends that the *Fisheries Amendment Act, 1980* be revised to make advisory committees structured on a species basis a mandatory part of the joint authorities approach, with compulsory industry representation (p. 72).

One other observation, not made by the Senate committee, is the potential problem of interrelating fisheries. There seems to be an implicit suggestion in the Australian system that each fishery can be viewed in isolation from all the others. While there is nothing in theory to prevent joint authorities’ being allowed to manage all stocks and species that connect to each other, it seems likely that fitting the biological matches to political and institutional demands will prove unrealistic.

United States

On May 22, 1953 the U.S. Senate and House of Representatives enacted in Congress the *Submerged Lands Act*.²² Section 3 provided:

3(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources . . . be, and they are hereby . . . recognized, confirmed, established, and vested in and assigned to the respective States. . . .

Section 2 defines “lands beneath navigable waters” as the non-tidal waters in each state and:

. . . all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time

such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles. . . .

The term "coast line" is defined as the "ordinary low water" line where the coast is in "direct contact with the open sea." As well s. 2 defines "natural resources" to include "fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life. . . ."

Section 4 of the *Submerged Lands Act* also states:

The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary.

Section 4 authorizes any other state to extend its boundaries to the same points. A state may claim a more extended boundary if it had such prior to becoming a member of the Union. This was done, for example, in *U.S. v. Louisiana et al.*²³ with the result that Texas and Florida achieved boundaries extending seaward three leagues (Louisiana, Mississippi and Alabama were entitled to only a third of this distance, or three geographical miles).

The act reserves to the federal government in these areas all controls related to commerce, navigation, water power, flood control, national defence and international affairs.

To summarize, in the United States, freshwater fisheries and tidal fisheries up to a distance of at least three geographical miles in the offshore are under exclusive state control.

In 1976 the U.S. federal government passed the *Fisheries Conservation and Management Act, 1976*, the title of which was formally changed in 1980 to the *Magnuson Fisheries Conservation and Management Act* (MFCMA).²⁴ This act extends U.S. fisheries jurisdiction out to 200 miles in the offshore. The 197 miles beyond the 3-mile state limit form the Fishery Conservation Zone (FCZ). This area is broken into eight regions, with a Regional Fishery Management Council for each. There are now councils for New England, the Mid-Atlantic, the South Atlantic, the Caribbean, the Gulf of Mexico, the Western Pacific, the Pacific and the North Pacific. Each council is composed of a designated number of voting members (ss. 302(a) and (b)) derived by allowing the governor of each coastal state in the management area to appoint his principal fishery manager and to submit a list of other qualified individuals (at least three names for each vacancy) to the secretary of commerce. The secretary then appoints a certain number from these lists (approximately twice the number of concerned states), at least one of which must come from each concerned state. The regional director of the National Marine Fisheries Service (NMFS) is also a voting member. This results in a majority of all councils being made up of state-appointed or state-approved voting members.

The central function of the councils is to develop fishery management plans. These are implemented through regulations promulgated by the Department of Commerce. The management plans establish fishing zones, catch limits and gear restrictions with the objective of achieving and maintaining "on a continuing basis, the optimum yield from each fishery." One important component of the U.S. process of management-plan formulation is public participation, with public hearings being mandated by s. 302(h)(3) "to allow all interested persons an opportunity to be heard in the development of fishery management plans and amendments to such plans, and with respect to the administration and implementation of the provisions of this Act." In addition to promulgating regulations, the federal government reviews the councils' plans to ensure conformity with the principles set out in the *Magnuson Act* and makes sure that appropriate information is made available to the regional councils for the preparation of their management plans. Each council receives advice from a scientific and statistical committee and an advisory panel appointed by it.

Thus, it may be seen that the United States operates a system of fisheries management under which the states control all aspects of fisheries within their boundaries. This includes all freshwater areas, tidal waters in the inshore landward of the territorial sea's base line, and marine waters in the offshore up to a minimum of three geographical miles.²⁵ The area between 3 and 200 miles forms the FCZ, which is managed by eight regional councils; these in turn are subject to some review by the federal government.

There seems to be moderate satisfaction with this system in the United States. In its July 1982 report to the President and Congress, *Fisheries for the Future: Restructuring the Government-Industry Partnership*, the National Advisory Committee on Oceans and Atmosphere (NACOA) stated (p. 19):

The MFCMA established for the first time in the Nation's history the concept of national fishery management by regional entities created by Federal law. The basic concepts of the Act have been shown to be sound, but its implementation is proving to be cumbersome in some ways. Increased efficiencies can be obtained by both government and industry.

and later (p. 31):

The Magnuson Fishery Conservation and Management Act of 1976 (MFCMA) is the principal document describing the administrative and legal machinery for management of U.S. fishery resources. This complex and hitherto untried system has worked well in accomplishing the objectives of reversing the ominous trends of depletion of some important fisheries and of controlling foreign fishing. Not surprisingly, however, the Act is not perfect in specifying authorities and responsibilities of the groups implementing its provisions, and certain modifications appear to be appropriate.

While a great deal of emphasis is placed in the report on the need for more information about the fisheries in order to prepare more rational plans, major consideration is given to the need to clarify the roles and responsibilities of the various actors in the process. The report notes that the MFCMA intended the regional councils, and not the secretary of commerce (in reality the National Marine Fisheries Service, NMFS), to manage the fisheries. The secretary is not to substitute his judgment for the council's; his review function is only to ensure that regional actions are in the national interest and, as s. 304(b) of the MFCMA mandates, "consistent with the national standards, the other provisions of this Act, and any other applicable law." Some friction has apparently resulted between the councils and the NMFS in interpreting their respective mandates; NACOA recommends confirming the dominance of councils in formalizing management strategies.

Another problem identified is the practice of centralizing the plan-review process by the NMFS in Washington, D.C. The report notes that the MFCMA is "based on the belief that local problems and solutions are best handled by local people" (p. 33). Hence, the advisory committee concludes, many aspects of the NMFS review "might be done more wisely and faster by the NMFS Regional Directors than by NMFS headquarters in Washington, D.C." NACOA desired to "bring the decision-making closer to the affected fisheries" (p. 33).

One significant shortcoming of the U.S. system is highlighted in NACOA's recommendation that the regional councils "lead an intensive effort to devise more effective arrangements for developing State and interstate fishery management, including Indian tribe activities where appropriate, for important inshore fisheries" (p. 35). In the words of the advisory committee (p. 34):

No adequate authority exists to require comprehensive management for a number of important interstate stocks (e.g., striped bass) and stocks that occur both inside and outside the 3-mile limit but which are pursued predominantly in State waters (e.g., American lobster). Cooperative management of these resources is particularly important, because *about two-thirds of the domestic commercial harvest and a majority of the recreational catch is taken in State waters*. Operating costs in the recreational fisheries (e.g., fuel costs) are causing sport fishermen to make shorter trips and are increasing pressures on many inshore stocks, such as weakfish and some flounders. *Success of management under the MFCMA is therefore heavily dependent on actions of States and Indian tribes in cooperation with Council FMPs*. The MFCMA provides for Federal preemptive authority over conflicting State regulations, but this has only been invoked once (on salmon regulations in Oregon in 1982). [Emphasis added]

The report continues this theme (p. 35):

In many cases, States have established regulations that reinforce the Council FMPs. In other cases, failure by States to institute management support

tive of Council actions, or the lack of coordination among several States in the regions, has reduced management effectiveness.

In pointing toward solutions to this very important problem, NACOA states that "some delegation of State authority" will be required and that this will be controversial (p. 36). Using the three existing interstate marine fisheries commissions as examples, the advisory committee concludes that they have achieved "only limited success" in regional management, "due, in large part, to their inability to persuade States to delegate any fishery management authority" to them. NACOA suggests that if more effective interstate management cannot be developed from existing mechanisms, "Congress may be required to develop legislation to address these jurisdictional problems."

Interjurisdictional problems remain of current concern. Two bills proposing an *Atlantic Striped Bass Conservation Act* have been introduced, one in the House of Representatives on April 12, 1984 (H.R. 5492) and one in the Senate on June 13, 1984 (S. 2758). The thrust of both bills is to force states to comply with regional management and conservation guidelines for this migratory species developed by the Atlantic States Marine Fisheries Commission (this commission already exists as a result of a compact between the member states). This is done by threatening statewide moratoria on striped bass fishing in recalcitrant states. The introduction of these bills "demonstrates the enormous counter pressure generated by the clear failure of States to establish concerted management."²⁶ And while the federal government is prepared, if the bills are enacted into law, to force conservation where necessary, the act is intended, according to Senator Edward Kennedy in his introductory statement to the Senate, to "preserve the primary role of State governments in the management of species within State waters. . . ."²⁷

Under the U.S. governmental system, the experience under particular legislation is periodically reviewed by the congressional committees responsible for its operation. The MFCMA was given such an "oversight" review in the fall of 1981 by the Subcommittee on Fisheries and Wildlife Conservation and The Environment of the Committee on Merchant Marine and Fisheries of the House of Representatives. Two points of interest arose from those hearings. First, one issue raised by the subcommittee was the desirability of consolidating the eight existing regional councils into a smaller number. One of the reasons for suggesting this was the problem of managing a fishery resource throughout its range. William Gordon, the deputy assistant director for fisheries of the National Oceanic and Atmospheric Administration (NOAA) and head of NMFS, in responding to this suggestion indicated that his service had taken no position yet. He noted further that several critical problems had to be considered. For example (p. 11), could a consolidated council properly take into consideration its constituencies, and what would the boundaries be?

The subcommittee was also concerned about geographic areas under federal management which are surrounded by areas under state control. This could happen as a result of barrier islands more than six miles off the coast. These islands would result in six miles of water under state control, with an area of water under federal control sandwiched in between. Mr. Gordon indicated that these areas should be under state control.

In January 1984, the same William Gordon delivered a paper in which he stated:

The number and complexity of the procedures and actions required by the Magnuson Act, other laws, regulations and Executive Orders have made the Fishery Management Plan (FMP) process time-consuming, frustrating, and sometimes too slow and inflexible for effective fishery management.²⁸

One of the areas he suggests be explored is "the role of the States in managing certain fisheries beyond their respective jurisdictions."²⁹

Other institutional reforms of the U.S. fisheries administration are under consideration by Congress. Included are the possibility of NOAA becoming an independent agency, the creation of a national fishery development corporation, the creation of a national fishery marketing board, and the creation of a national ocean policy commission. Apparently an independent NOAA is thought to be beneficial because this would free it from the constraints of the Department of Commerce and allow it to make the quick responses required in the day-to-day management of living resources. However, severing NOAA from Commerce is apparently tied to a major revamping of the Department, which is unlikely. And the suggestions of national entities for development, marketing and ocean policy conflicts with the view of many that centralization of authority for many of these functions is undesirable; industry will invest when it believes a profit can be made and development cannot be forced.³⁰

At least one Canadian source has commented on the U.S. fishery management institutions. Newfoundland Oceans Research and Development Corporation (NORDCO), a provincially owned independent consulting company, in its 1981 report on northern cod noted several problems. They are, to quote the report:

- the jurisdictional conflict between the Council and the federal government;
- the jurisdictional conflict between the state and federal governments;
- obtaining management information from scientific and industry community and the problems of reliability of scientific data; and
- the enforcement of fishery management laws.³¹

The core of the problem between the council (the focus is on the New England Council) and the federal government is as a result of funding.

Both the council's budget and the kinds of expertise permitted to be hired by way of staff are controlled by the federal government. Funding, NORDCO states, has been insufficient to allow the New England Council to manage all the fisheries needing its attention, and the council has only been allowed to recruit staff capable of evaluating, but not of generating, biological and economical information. The suggestion seems to be that the councils are not independent enough of the federal government's influence to avoid bureaucratic infighting over areas of responsibility.

NORDCO's comments on jurisdictional conflicts between the state and federal governments would seem to be more appropriately labelled as state/council conflicts. The report notes that a majority of a council's membership is made up of state appointees/nominees: two for each state, for a total of ten out of seventeen in the case of New England. Not only do the states and their interests dominate within the council, but they can create problems in two other ways. First, as noted earlier in this paper, state policies within their three-mile limit can adversely impact on a fishery management plan (although in the final analysis the states can be brought into line by federal pre-emption). Second, much fishery enforcement work is done by the states, even to the point of state agencies sometimes being contracted to enforce federal laws. Certainly, the way enforcement activities are carried out can enhance or frustrate management initiatives. The NORDCO report does, though, take the view that the power of the states "is an effective check on the power and authority of the federal government, which has worked fairly well and should be retained."³² The other two problems do not warrant further comment here.

European Economic Community (EEC)

The EEC is not a federal state but does represent a type of economic union in which some of the sovereignty and consequent independence of member states is submerged to promote the overall, common benefit of members. The current member states are Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom, with Spain and Portugal, at the time of writing, keenly interested in joining. The EEC is formally constituted by the Treaty of Rome, a binding document to which the members have subscribed. The member states were required by the agricultural provisions in the Treaty of Rome (agriculture being defined to include fisheries) to organize fisheries through a common policy. The way in which this has been done is instructive because for fisheries purposes, the EEC may be regarded as a single coastal state with internal political subdivisions.

Decision making with respect to fisheries is carried out by the Council of Ministers of Fisheries. This is a body made up of political office holders, namely the ministers of fisheries in the various national govern-

ments. As such, it may be assumed that they normally pursue policies set by their national governments and parliaments.

The Council of Ministers is assisted in its work by the European Commission. The Commission is composed of high-ranking national bureaucrats who are nominated by their governments. Within the commission there are 28 directorates, one of which is the directorate of fisheries. This directorate is composed of two departments, one managing the fishery resources and the other managing marketing and structure.

Before a proposal can be adopted by the Council of Ministers, the views of the EEC parliament (consisting of national politicians) and of the Economic and Social Committee (made up of people from economic and social spheres such as industry, agriculture and unions) must be heard. The Council need not accept the suggestions of either parliament or the Committee.

Three other formal groups also play an advisory role or otherwise give input into the Council of Ministers: the Committee of the Permanent Representatives (consisting of officials from the member states' embassies in Brussels), the Scientific and Technical Committee (consisting of national scientific researchers who are to provide independent scientific advice to the Commission), and the Advisory Committee for Fisheries Management.

The first components of a common fisheries policy were adopted by Council in October 1970 to come into force in February 1971. The central feature of this policy was the principle of equal access by all member states to territorial waters within the EEC. Detailed proposals for a common fisheries policy were brought to Council by the Commission in September 1976. These proposals dealt with conserving fishery resources through a system of total allowable catches (TACs) and quotas, safeguarding, as far as possible, employment and income in coastal regions and adjusting fleet size to correspond with the catch available.

As of January 1, 1977 the EEC extended the fisheries jurisdiction of member states to the now common 200-mile limit — Exclusive Economic Zone (EEZ). From that date forward the EEC, through its own regulations and national measures, negotiated fishing rights with other non-member countries, set the TACs in its own waters, allocated the TACs among member states and imposed conservation measures, including a ban on herring fisheries, by-catch rules, and the closure of certain areas. Even so, the regulation of fishing within the 200-mile limit has been the object of serious disagreement and dissension in the formulation of a common fisheries policy. Despite such objections, however, it is clear that as a matter of law and jurisdiction the Council, acting on a proposal from the Commission and after consultation with the European Parliament, is required under Article 43 of the EEC Treaty of Rome to implement a common fisheries policy.

One of the earliest principles, established in 1976 by Regulation 101/76,

was equality of access for community fishermen within the fisheries limits of member states. The impact of the application of this principle upon states with substantial resources, however, was a source of friction. At least as of November 21, 1978, the Commission's proposals for a common fisheries policy emphasized that:

The allocation of quotas should be based on three main criteria — first, respect for historic performance in order to avoid unnecessary changes or ruptures in the existing fishing pattern; secondly, they must be consistent with the requirements of regions particularly dependent on fisheries; thirdly, they must help solve the problems caused by recent changes in the fishing pattern of Member States' fishing fleets.³³

Apparently, the Commission realized that these criteria, to some extent, conflict. There was also concern that allocations not be by rigid formulas which would prevent account being taken of developments in the fishing industry and in fish stocks.

Fishing rights within the territorial limits, i.e., the 12-mile limit, also posed problems. Within this area, in 1978, the Commission proposed an exception to its principle of equal conditions of access in order to protect the inshore fisheries. The emphasis in this area would be in favour of "vessels which fish traditionally in those waters and which operate from ports in the local coastal area."³⁴ Historic rights enjoyed by member states to fish within another member's 12-mile limit would be recognized.

The United Kingdom has taken the strongest exception to the proposed common fisheries policy. This is attributed to three factors: 55–60 percent of the fish stocks found in community waters are located in the United Kingdom's EEZ; the United Kingdom's belief that it has practised more effective conservation than other member states in the past; and its belief that it has suffered the most from the extension of fisheries' jurisdictions, i.e, 200-mile EEZs, elsewhere in the North Atlantic. As a result, it wanted the 12-mile limit exclusively for U.K. fishing vessels, preferential access to areas within its 200-mile EEZ, and bigger quota allocations which take account of its earlier conservation efforts and the contribution to resources represented by fish stocks within its own EEZ.

On January 25, 1983, after six years of negotiation, the Council formally reached agreement on the new fisheries policy. The European Community's Bulletin (1-1983) states (p. 7):

The new policy has four constituent parts; a Community system for the conservation of resources; structural measures; a common organization of the market; and fisheries agreements with non-member countries and formal consultations between Member States with a view to concerted action in the context of international agreements.

The bulletin continues by pointing out that a regulation was adopted establishing a community conservation and management system that

“provides for measures to restrict fishing activities, rules for using resources and special provisions for coastal fishing.” Technical measures concerning mesh sizes, by-catch rates and restrictions on fishing in certain areas and at certain times are dealt with by regulation. With respect to TACs and quotas, the bulletin states (p. 8):

The Council has fixed the share of the TACs available to the Community and the allocation of this share among the Member States (quotas), taking account of commitments to non-member countries. Available resources have been allocated among the Member States on the basis of the criteria laid down by the Council on 30 May 1980, namely traditional fishing activities, the specific needs of regions which are especially dependent on fishing and the loss of fisheries in the waters of non-member countries [note omitted].

Concerning the quotas, one commentator, Robin Churchill, noted:

It appears that the quotas themselves are fixed in long-term percentages; this should therefore prevent annual haggling between the member states.³⁵

He also noted the importance of not boosting the TACs beyond levels recommended by fishery scientists so as to increase each state's share, and of adequate enforcement by the member states and ultimately by the EEC against member states if these states do an inadequate job. As this criticism implies, fisheries enforcement is decentralized: it is an on-line responsibility of the national governments.

The policy also gives preference to local inshore fishermen by maintaining six- or twelve-mile exclusive national zones.³⁶

Even before the adoption of the common fisheries policies it was clear that EEC member states have very limited competence to adopt national fishery conservation measures. This has been confirmed in at least three decisions of the European Court: *Commission v. United Kingdom*, Case 804/79, [1981] E.C.R. 1045; *R.v. Tymen*, Case 269/80, [1982] 2 C.M.L.R. 111; *Openbaar Ministerie v. Bout*, [1982] 2 C.M.L.R. 371. As of the end of 1978 when the transitional period laid down in Article 102 of the Act of Accession expired, to quote the European Court in the Tymen case, “a Member State does not have the power to adopt and bring into force, without appropriate prior consultation with the Commission and in spite of objections, reservations or conditions formulated” by the Commission, a fishery conservation measure, such as Britain's Fishing Nets (Northeast Atlantic) (Variation) Order 1979. Robin Churchill has summarized these decisions by saying that:

In future cases where the Court is faced with assessing the compatibility of national fishery measures with Community law . . . its decision will largely turn on the question of whether there has been adequate consultation with the Commission and Commission approval for the measure in question. If there has been adequate consultation and the measure has been approved, it will be compatible with Community law; if not, not.³⁷

Thus, there are four essential features of the present fisheries arrangements within the EEC. First, there is central control by the European Council over all fisheries matters within the 200-mile Exclusive Economic Zone adjacent to the member states. Included in this control are all things embraced by the notions of conservation in the Canadian federal fisheries power, such as the establishment of total allowable catches (TACs), gear regulations, closed seasons and areas, minimum fish sizes, licensing, enforcement, and the allocation of TACs among member states. Second, to underscore the last item, the Council does allocate individual quotas on a state-by-state basis. This has caused considerable contention, as one would also expect, both in the EEC and in Canada, because of the economic and social consequences of the way of dividing the figurative pie constituted by the TAC. Third, a principle of equal access for all member states applies within the EEZs, subject of course to the quotas. And fourth, a band six to twelve miles wide is reserved to each member state along its coast for the exclusive access of that state's nationals.

The Canadian Debate

What the Provinces Want

Constitutional reform was high on Canada's public affairs agenda in the late 1970s and early 1980s, culminating in the *Canada Act, 1982* (U.K.). Although not as prominent as many other issues, fisheries was nevertheless an important topic of discussion involving the first ministers as well as ministers of fisheries and departmental policy makers. The purpose of this section is to highlight the positions taken during these negotiations by the central actors.

QUEBEC

Quebec was unique in Canadian fisheries between 1922 and 1983: in those years it administered its own coastal fisheries. By order-in-council, P.C. 360, approved by the governor general on February 13, 1922 and precipitated by the Privy Council's decision in the *Quebec Fisheries Reference* [A.-G. Can. v. A.-G. Que., [1921] 1 A.C. 413], Quebec was delegated "under proper regulation by the Federal Government as to conditions under which such fishing may be carried on, the responsibility for the administration of all the coastal fisheries of the Province as well [as the river fisheries], with the exception of those about the Magdalen Islands." A further order-in-council, P.C. 1890, on March 15, 1943 removed the exception related to the Magdalen Islands so that Quebec's responsibilities were enlarged to include the fisheries of those islands, which are part of that province. Thus, all fisheries within Quebec were administered by Quebec. This included the freshwater

fisheries (non-tidal), like all provinces west of Quebec, and the coastal (tidal) fisheries in the St. Lawrence River and the Gulf of St. Lawrence adjacent to Quebec, including the Magdalen Islands.

In 1982, the Kirby Report on the Atlantic Fisheries made the following recommendation:

9. Consolidate federal management of the fisheries in the Gulf of St. Lawrence by resumption of full federal responsibility for licensing and other aspects of marine fisheries management in Quebec.

In its justification for "consolidating federal management of the fisheries in the Gulf of St. Lawrence" the report states (p. 86):

The continued division of responsibility for administration of the harvesting sector in Québec creates confusion among fishermen; both duplication and gaps in essential activities and in obtaining essential information; and dissatisfaction in other provincial governments as well as in the industry generally. The difficulty of obtaining the most basic information on Québec fisheries leads to the conclusion that the status quo is not acceptable.

In addition to its "concern about duplication, confusion and lack of data," the report stated that "[a] different approach is required for the management of modern fisheries that use highly mobile gear and where the stocks are being exploited by fishermen from five different provinces."

This recommendation was accepted by cabinet and Quebec's administrative delegation was revoked. Quebec's response has been, basically, to reinstitute the system that gave rise to the delegation in the first place: a system of provincial licences for anyone using the bed or shore of the provincial public domain to affix or deposit fishing gear. Quebec, at the time of writing, is on the verge of passing Bill 48, entitled "An Act Respecting Commercial Fisheries and Aquaculture and Amending Other Legislation." Two key provisions are ss. 3 and 4, which provide:

3. The Minister may grant the right to fish for commercial purposes in tideless waters of the public domain.

In tideless waters, the right comprises the right to use that part of the shore or bed that is part of the public domain to affix or deposit fishing gear or installations intended for commercial fishing.

4. The Minister may, in tidal waters, grant the right to use that part of the shore or bed that is part of the public domain to affix or deposit fishing gear or installations intended for commercial fishing.

It seems obvious that Quebec is asserting the right to control commercial fishing which utilizes fixed gear (trap or pound nets, weirs, lobster and crab pots, and gill nets) in tidal waters within the bounds of the province. If Quebec can do this, so, it would seem, could the other provinces. It will be interesting to observe the impact of this dual licensing scheme.

On July 8–11 1980, a meeting of the Continuing Committee of Minis-

ters on the Constitution met in Montreal. At that time Quebec presented a position on fisheries (*Notes for a Statement by Quebec: Fishing*; Document: 830-81/018). Quebec began by noting that while it has had administrative responsibilities for inland and coastal fisheries, the agreements did not affect the distribution of powers under the Constitution. It noted the federal government's continuing administrative role "when fishing and the inspection of fish for export have been involved," and then described how the federal government had, by taking a broad view on protecting the fisheries, become "involved in a major way in water management."

On constitutional amendment, "Quebec proposes conferring on the provinces exclusive legal jurisdiction over fishing and fisheries in the waters within its territory. It is time that the anomaly in the Constitution, which excludes fishing and fisheries (that is, the facilities and equipment related to fishing) from general provincial jurisdiction over natural resources [be removed]." In partial justification, Quebec referred to "its responsibility to manage and exploit the resources in its territory for the welfare of Quebecers." It also referred, in relation to itself and the five other coastal provinces, to "the importance of the fishing industry in the life of their citizens."

More precisely, Quebec's proposals were twofold. First, it would repeal s. 91(12), the federal fisheries power, and add to the provincial list as s. 92(13A) "Fishing and fisheries in the province." While no guidance is offered as to the difference between "fishing" and "fisheries" or as to why the old terminology of "fisheries" was inadequate, presumably "fishing" refers to the activity while "fisheries" refers to the resource. The Quebec proposal is silent as to fishing and fisheries that are not situated in any province.

The second proposal was directed at carving up the Gulf of St. Lawrence among the five adjacent provinces, with the result that no area would, in fact, be federal. They would add to the *Constitution Acts, 1867 to 1982* a new s. 7A, stating:

7A. The Gulf of the St. Lawrence is, and has always been, an integral part of the territory of the Provinces of Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland in accordance with a plan following the dividing lines equidistant from their respective coasts.

Thus, it may be seen that Quebec's preference is for an expansive interpretation of provincial boundaries in tidal waters and exclusive provincial fisheries jurisdiction within those boundaries. This would, of course, include the non-tidal fisheries. Its proposals, however, are silent with respect to fisheries in the offshore.

At the same July 1980 meeting, Quebec dealt with the offshore in a separate statement (*Notes for a Statement by Quebec: Offshore Resources*, Document: 830-81/019). It restated its position in the Gulf,

i.e., that its territory extends to a median line. With respect to the continental shelf and the 200-mile limit, "Quebec, while accepting that Canada has concurrent jurisdiction, believes that the constitution should recognize provincial paramountcy as regards legislation." Presumably, this means concurrent fisheries jurisdiction in the offshore but provincial paramountcy. Since the coastal provinces would normally have no authority to enact legislation for areas beyond their boundaries and taking into account the general tenor of the statement against federal interests, it seems that Quebec would support acquisition by the coastal provinces of all areas and rights accruing to Canada, the international state, at international law. If this is so, it is difficult to see how the federal government would have any legislative power, concurrent or otherwise, in relation to natural resources in those areas owned or controlled by the provinces. This would be especially so with respect to fisheries, since with the proposed repeal of s. 91(12), there would be no federal fisheries power at all.

NEWFOUNDLAND AND LABRADOR

Newfoundland's position on constitutional amendment has been reiterated recently in a fisheries policy paper emanating from the Newfoundland Department of Fisheries: *The Fisheries: A Business and Way of Life* (June 1982). The province seeks "the establishment of a concurrent jurisdiction with the Federal Government over the fisheries" (p. 3). The paper then quotes the text of the government's more general constitutional position document, *Towards the Twenty First Century — Together*. The federal government would have "'paramount authority regarding international negotiations, surveillance, international enforcement, basic research, conservation and the determination of total allowable catches, inspection and quality standards for export and licensing of foreign vessels.'" The province would have "'paramount authority regarding harvesting plans, the allocation of its share of fish stocks, the licensing of its own fishing boats, inland fisheries, aquaculture, marine plants and sedentary species.'" The identical position was put before this Royal Commission in the Newfoundland government's formal submission in St. John's in September 1983.

As a preamble to this position, the fisheries policy paper notes the importance of fisheries to Newfoundland and states (p. 3):

Compared with other provinces in Canada, Newfoundland does not have the level of jurisdiction over its most important natural resource which is necessary to economic and social planning and development. The lack of legislative jurisdiction over fisheries for this Province is analogous to a prairie province having no jurisdiction over agriculture.

The paper had earlier noted that "virtually the entire socio-economic

fabric of the rural economy [of Newfoundland] has evolved around the fishery" (p. 1) and that "the fishery must continue to provide the cornerstone for economic development and increased prosperity in the years ahead" (p. 2).

The June 1982 position is, with slightly more detail, the same one put forward by Premier Peckford at the Federal-Provincial Conference of First Ministers on the Constitution held at Ottawa on September 8-12, 1980 (*Speaking Notes on Fisheries*, Document: 800-14/057). There he "proposed a system of concurrent jurisdiction for sea-coast fisheries." Ottawa would:

. . . exercise paramount jurisdiction over the international aspects of the fisheries and over important national aspects such as conservation of the resources. However, other aspects of fisheries management which have an essentially local or provincial character should come under provincial jurisdiction.

Newfoundland refers to aquaculture, marine plants and the fishery for sedentary species and notes that the federal government appears:

. . . prepared to recognize the essentially local character of these fisheries and to acknowledge the priority of exclusive provincial jurisdiction over many aspects of this question.

Premier Peckford also refers to the federal desire to reserve some jurisdiction "over the fishery for species, such as salmon, in inland waters" and responds by saying:

Federal jurisdiction should extend only so far as it is necessary to preserve and conserve those fish stocks in a healthy state. That is to say, . . . it should extend only to the determination of the volume or the number of fish which can be removed by the fishery in a given year.

Concerning the protection of fish habitat, Newfoundland says that the federal government's jurisdiction should not be so broad as to allow it "to effectively control the use of the water resources of our province."

Premier Peckford, in his 1980 statement, also addresses the question of native peoples' fisheries. He feels the issue should not be addressed in isolation but rather as part of "the whole question of native peoples' rights and entitlements within the Canadian community." He also says that any amendment to the British North America Act should "make explicit reference to the fact that any new provisions . . . do not diminish the rights of native peoples in inland fisheries."

As justification for Newfoundland's fisheries position, the premier states (p. 1):

Virtually every coastal community on the island of Newfoundland and on the coast of Labrador depends on the fishery as its principal source of economic activity. Therefore, decisions taken regarding fisheries manage-

ment determine whether these communities will thrive and flourish or whether they will wither and die.

He goes on to point out that these decisions affect not only individual communities, but also the "whole process of delivering public services, roads, schools, hospitals, etc." Later he re-emphasizes these points by referring to the fisheries as "a resource, the management of which pervades every aspect of its [Newfoundland's] society and determines the social, economic and cultural vitality of virtually every one of its communities."

NOVA SCOTIA

In April 1983 the Nova Scotia Department of Fisheries put forward its *Position on Fisheries Jurisdiction*. This relatively extensive document suggests that provincial jurisdiction or some form of delegated responsibility would be appropriate for:

- inland fisheries, excluding anadromous (e.g., salmon) and catadromous, (e.g., eels) species;
- sedentary species (e.g., clams, oysters);
- sea plants;
- aquaculture; and
- certain socio-economic or contractual matters occurring within these waters (e.g., over-the-side sales).

The reference to "within these waters" means marine areas that may be within Nova Scotia such as "tidal zones, three-mile limits, specific bays and estuaries, and inland waters." Nova Scotia also identified three other areas where responsibilities should be clarified:

- beaches, particularly when dealing with marine mammals on such beaches and approaches;
- the boundaries defining inland and tidal waters on streams and rivers; and
- the extent to which provisions for habitat protection within the federal Fisheries Act can be used to regulate land-based activities within the province.

The Nova Scotia document maintains that federal authority should be paramount in fisheries matters which affected more than one province, which deal primarily with the protection and conservation of the common property fisheries resource "in the wild," or which involve international agreements, interprovincial and international trade, navigation, shipping or harbour facilities. The document also notes that Nova Scotia was the only province to support the federal position on fisheries jurisdiction during the constitutional conferences of 1980. This is because Nova Scotia sees it as advantageous to prevent the balkanization of

fisheries by restricting the mobility of the fleets. Nova Scotia tends to have larger, more mobile fishing vessels better able to travel to waters adjacent to other provinces.

One interesting aspect of the Nova Scotian discussion is its emphasis on distinguishing the socio-economic factors from the biological. "For example," the report notes, "establishing an overall quota or total allowable catch for a particular fisheries stock is a measure to protect the resource [based on biology]. Allocating the quota amongst the inshore and offshore sectors of the fleet is a socio-economic issue (p. 11)."

The Nova Scotia report continues:

In other words, whereas one part of resource management deals with the well-being of the "fish and other marine resources," the second part deals with the well-being of the "fishermen, the plant workers, and others in the industry." The increasingly dominant role of the federal government in this latter aspect of fisheries management can be seriously questioned. Whereas policies for the protection of the fisheries resource can and should be uniform throughout Atlantic Canada, the social and economic structures and goals for the industry vary dramatically in the various geographical areas. It is our opinion that developing the fishing industry to reflect this diversity is most appropriately a responsibility of the Province. In this respect, the fishing industry is no different from other industries in the Province.

In an earlier document put out by Nova Scotia, *Fisheries General Policy, 1980* the province also emphasized that the fisheries should be regarded as a "Canadian resource" so that there should be no provincial allocations of catch quotas or trends toward provincial "territorial waters" (p. 2).

On February 5-6, 1979, a federal-provincial conference of first ministers on the Constitution was held in Ottawa. The *Comments by Premier John M. Buchanan on Fisheries and Constitutional Review* delivered at that time emphasize the importance of the coastal fishery to Nova Scotia: "the fishery . . . is as vital to Nova Scotia and Newfoundland as wheat is to Saskatchewan, oil to Alberta, or manufacturing to Ontario." The problem is put this way:

In the case of the fishery resource, the province has not been able to develop the fishing industry in the manner that would achieve provincial objectives and bring the greatest benefits to Nova Scotia. Unlike all other natural resources, the fishery is managed by the federal authority. *Since it is not possible, certainly not practical, to realistically pursue fisheries development separately from fisheries management*, the province cannot develop its fishing industry despite the fact that industrial development is clearly within provincial jurisdiction. [Emphasis in original]

The only solutions offered in 1979 were "some form of concurrent jurisdiction in the fisheries" and "entrenchment of the joint management principle," both to be included in the Constitution. It was not until 1983

that full flesh was added to these bare bones. Nevertheless, Nova Scotia did, in the last full round of constitutional discussions, make clear the importance of fisheries to the province and its dissatisfaction with the existing regime.

PRINCE EDWARD ISLAND

At the July 15–18, 1980 meeting of the Continuing Committee of Ministers on the Constitution in Toronto, Prince Edward Island stated in its *Position on Fisheries* [Document: 830-82/011]: “Put fisheries into Section 95 as a concurrent jurisdictional area.” Prince Edward Island felt that “a definitive list of *exclusive* jurisdictional areas would be difficult to arrive at” and so we ought to follow the model provided by agriculture and immigration in s. 95 of the *Constitution Acts*. This would presumably give the federal government paramouncy over fisheries in conformity with the present provisions in s. 95.

The province also stated that “there should be enshrined in the Constitution a federal obligation to protect the fisheries and an equitable right of access by coastal provinces as a matter of principle.” No explanation was offered to clarify these suggestions.

Prince Edward Island emphasized on the one hand, the provincial interest in fisheries development and marketing and on the other, that “the subject of fisheries is one which by its very nature extends beyond the interests of a single province . . . [and] therefore requires a strong federal authority . . .” Part of the rationale for P.E.I.’s position was to “encourage meaningful joint consultations.”

BRITISH COLUMBIA

The *British Columbia Position: Fisheries* [Document: 800-14/063] was put forward at the Federal-Provincial Conference of First Ministers on the Constitution held at Ottawa on September 8–12, 1980. It supported exclusive provincial jurisdiction over inland fisheries, marine plants, aquaculture and sedentary species. With regard to seacoast fisheries, British Columbia expressed “a desire for shared responsibility . . . we want to have a share in the management responsibility.” British Columbia supported a proposal, to be outlined later in the 1980 Best Efforts Draft (reproduced below), allowing for federal paramouncy over fixing parameters for the TACs, quota allocations to foreign countries, the licensing of foreign vessels, and conservation of fish stocks, with provincial paramouncy otherwise.

Of particular note in the 1980 B.C. statement is its frequent reference to recreational fishing. The fishery, it states, “provides hundreds of thousands of days of recreation for residents and non-residents alike.” “Of equal importance [as compared to the commercial salmon interests]

are the very real concerns of the recreational fishermen.” British Columbia refers to “domestic sport fishing,” their “fast burgeoning tourist industry” and “restriction on sports fishing . . . unheard of in past years . . . [but] now commonplace.” Singled out were steelhead, which are seagoing rainbow trout regarded as “one of the world’s most desired and respected sport fish.” The species has suffered because commercial nets do not distinguish between them and salmon and so capture both indiscriminately. “The steelhead fisherman, seeing his sport decline, knows how much value there would be in joint management and responsibility.”

British Columbia also points out that aquaculture and mariculture have a great future in that province. This, B.C. maintains, “imposes a very serious joint responsibility” on both levels of government.

ALBERTA

In October 1978 the Alberta government published a position paper on constitutional change titled *Harmony in Diversity: A New Federalism for Canada*. It dealt with fisheries by stating simply (p. 9):

E. FISHERIES

Recommendation:

The Alberta Government recommends:

12. that sea coast and inland fisheries be a concurrent power in the Constitution, with provincial paramountcy.

One of the most important renewable resource industries found in Atlantic Canada and in British Columbia is fisheries. The importance of this industry to the economies of the Province of British Columbia and to the provinces of Atlantic Canada requires constitutional recognition of the need for greater provincial control over this resource.

The Federal Response

In the July 8–11, 1980 meeting of the Continuing Committee of Ministers on the Constitution (CCMC) at Montreal, Jean Chrétien took an exploratory stance on behalf of the federal government. He noted that fisheries was on the agenda at provincial request, that in the federal view “no change to section 91(12) of the BNA Act relating to seacoast and inland fisheries is necessary,” but that the federal government was prepared to look at the possibility that “some new, practical arrangements might be appropriate in order to better take into account provincial views in fisheries decision making.” Mr. Chrétien said that he was aware of the controversy surrounding fisheries management decisions but suggested that this controversy was “perhaps inevitable when we consider that fisheries management has to involve decisions regarding the allocation of fishery resources between competing groups, sometimes coming from

different provinces.” Reference was made as well “to protecting the rights of Native Peoples and their interests in the fisheries resources, and protecting the habitat of the fishery resource base, particularly in fresh-water areas.”

Later in 1980, on September 8–12, a federal-provincial conference of first ministers on the Constitution was held in Ottawa. The federal position had adjusted considerably by this time and is put succinctly in *Notes for a Statement by the Prime Minister of Canada on Fisheries* [Document: 800-14/054]:

Fisheries

The Constitution of Canada gives responsibility for the fisheries to the Government of Canada. Down through the years, the fisheries off our coasts have been administered directly by the federal government, while at the same time the inland fisheries have, in most cases, been administered by the provinces operating under federal legislation.

Most of the provinces have been asking for major changes in these arrangements:

- *On the seacoast and marine fisheries*, nine of ten provinces want at least concurrent jurisdiction given to the provinces. One major fishing province [Nova Scotia] is strongly opposed to this.

In inland fisheries, nine of ten want exclusive jurisdiction given to them. *On marine and aquatic plants*, nine of ten provinces want exclusive jurisdiction.

On sedentary species such as oysters, all ten want exclusive jurisdiction.

On aquaculture, i.e., fish farming, all ten want exclusive jurisdiction.

On the anadromous species such as salmon, nine of ten want major powers given to them.

What is the position of the federal government on all this?

On the seacoast and marine fisheries, we have said no, we think it would be wrong to have concurrent jurisdictions, but we have offered to have much closer consultation — and have even offered to write a mandatory provision to that effect into the new Constitution.

On inland fisheries, we are ready to give this to the provinces because, generally, they are doing it now and doing it well. More important, most of these fisheries lie within a single province. We will want to make sure in doing this that native rights are protected, and that we can still protect fish habitat in interprovincial and international waters. Otherwise, we are responding fully to the wishes of the provinces who want this jurisdiction. We think a new constitutional arrangement along these lines will make sense for the fisheries concerned, the provinces, and the national interest too.

On marine and aquatic plants, we have said no to the provinces, because of our concern about protecting the plants which are so often a major part of the habitat of seacoast species. We are ready, however, to look at this once again, because we think a compromise in the interests of everyone may be possible.

On sedentary species, we are ready to give the provinces the jurisdiction they seek.

On the anadromous species, we are not prepared to go along, for reasons I will mention shortly.

It seems to me that, for a government which was asked to give up the exclusive jurisdiction it has held since Confederation over a most important aspect of Canadian life, the list of the positive responses which I have just read to you, is indicative of considerable flexibility on our part.

Former Prime Minister Trudeau's comments are based on draft provisions prepared as a result of the work of the CCMC. This work was put forward as "Best Efforts Drafts" of various amendment scenarios. In *Legal Texts forming Appendices to CCMC Reports to First Ministers* [Document: 800-14/059] the following detailed provisions were considered and received the support indicated:

BEST EFFORTS DRAFT

Amendment

Alternative Formulations

Regarding Inland Fisheries, Marine Plants and Sedentary Species

Supported by Nine Provinces

- 92.1(1) The Legislature of each province may exclusively make laws in relation to:
- a) inland fisheries in the non-tidal waters of the province;
 - b) marine and aquatic plants¹ in the non-tidal waters of the province and in tidal waters in or adjacent to the province¹;
 - c) sedentary species in tidal waters in or adjacent to the province;
 - d) aquaculture within the province and in tidal waters or adjacent to the province that is not included in either a), b) or c);

Supported by Federal Government and One Coastal Province

- The Legislature of each province may exclusively make laws in relation to:
- a) inland fisheries in the non-tidal waters in the province.
 - c) sedentary species in tidal waters in or adjacent to the province;
 - d) aquaculture within the province and in tidal waters or adjacent to the province that is not included in either a) or c);

- | | |
|--|--|
| <p>(2) Notwithstanding paragraph 1(a) the Parliament of Canada may make laws in relation to the determination of total allowable catches for andromous [sic] species in non-tidal waters and their allocation between provinces and any such law shall be paramount.</p> | <p>Notwithstanding paragraph 1(a) the Parliament of Canada may exclusively make laws in relation to seacoast and inland fisheries for andromous [sic] species.</p> |
|--|--|

Comment

- (1) The Federal government would also wish provision to be made for the protection of the fish habitat and native people's fisheries.

Notes

1. Requires definition.

Appendix II

BEST EFFORTS DRAFT

[Tabled with the Support of Most Provinces]
Amendment Regarding Sea Coast Fisheries

- (a) Section 91 (12) of the British North America Act would be repealed.
 (b) A separate section in the British North America Act, in the following terms, would be enacted.

95A (1) With respect to fish stocks adjacent to each province (as defined in subsection (5) below), the Legislature may make laws relative to the sea coast fisheries but any law covering those matters set out in subsection (3) shall have effect in and for the province so long as they are not repugnant to any Act of the Parliament of Canada made under subsection (2).

(2) The Parliament of Canada may make laws relative to the sea coast fisheries but any law covering those matters set out in subsection (4) shall have effect in and for any or all of the provinces so long as they are not repugnant to any Act of the Legislature of a province made under subsection (1).

(3) The matters referred to in subsection (1) are:

- (a) fixing parameters for the total allowable catch for stocks;
 (b) the allocation of quotas to foreign countries and the licensing of foreign vessels;

(c) conservation of fish stocks.

(4) The matters referred to in subsection (2) are:

(a) fixing the level of catch within the parameters referred to in subsection (3)(a) and the issuance of quotas up to the level so fixed;

(b) licensing of fishing vessels other than foreign vessels taking fish from the residual quota;

(c) all matters not referred to in this subsection and subsection (3).
(5)

(a) the allocation of the fish stocks adjacent to each province shall be determined by agreement between the provinces in accordance with equitable principles taking account of all information including traditional fishing patterns.

(b) If no agreement can be reached within a reasonable period of time, the provinces concerned shall refer the particular matter in dispute for expeditious arbitration.

Appendix III

DISCUSSION DRAFT TABLED BY GOVERNMENT OF CANADA OFFICIALS

1. Class 12 section 91 of the *British North America Act, 1867*, as amended, is repealed and the following substituted therefor:
12. Sea coast fisheries except those assigned exclusively to the legislatures of the provinces by subsection 92.1(1).
2. The said Act is further amended by adding thereto immediately after section 92 thereof the following heading and sections:

Fisheries
powers of
provinces

92.1(1) The legislature of a province may exclusively make laws powers in relation to:

- (a) fisheries in waters within the province other than tidal waters;
- (b) sedentary species in waters within or adjacent to the provinces; and
- (c) aquaculture within or adjacent to the province.

Exceptions for
anadromous
species

(2) Notwithstanding paragraph (1)(a), Parliament may exclusively make laws in relation to sea coast and inland fisheries for anadromous stocks that migrate to sea.

Protection,
etc. of fish
habitat

(3) Notwithstanding subsection (1), Parliament may make laws for the protection and enhancement of fish habitat in all tidal waters and in:

- (a) the waters of lakes, rivers and canals extending beyond the limits of any one province; and

	(b) inland waters that provide a spawning ground or habitat for anadromous stocks that migrate to sea.
Paramountcy	(4) A law made under subsection (2) or (3) prevails over a law made under subsection (1) to the extent of any inconsistency.
Definitions "Aquaculture"	(5) In subsection (1), "aquaculture" means operations in which fish or other marine or aquatic organisms are raised for harvest in an artificially enclosed space;
"Sedentary species"	"sedentary species" means marine animals which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil, but for greater certainty does not include crabs, lobsters or scallops;
"Adjacent to the province"	"adjacent to the province" means (geographical limits to be determined re sedentary species and aquaculture).
Indian fishing rights	92.2(1) Indians have the right to fish for food throughout the year for their personal and community use, both in the province in which they reside and in any other area to which an Indian treaty applicable to them applies, on all unoccupied Crown lands and on any other lands to which they may have a right of access, subject to provincial conservation laws that are reasonably necessary to secure to them a continuing supply of fish for this purpose.
Limitation	(2) Subsection (1) does not apply where the right described therein has been expressly surrendered by treaty.
Other rights	(3) Nothing in subsection (1) derogates from or diminishes any other right enjoyed by Indians, whether under treaty or otherwise.
Fisheries consultation	xx The minister of the government of Canada responsible for fisheries and a minister designated by each provincial government shall consult together at least once in every year, either bilaterally or on a regional basis, on the formulation, coordination and implementation of policies and programmes of the government of Canada respecting fisheries and provincial policies and programmes significantly affecting fisheries. xxx The Schedule to the <i>British North America Act, 1930</i> is amended by: (a) in portion (1) relating to Manitoba, deleting section 10 thereof and deleting in section 13 the words "and fish" and "and fishing" wherever they appear therein; (b) in portion (2) relating to Alberta, deleting section 9 thereof and deleting in section 12 the words "and fish" and "and fishing" wherever they appear therein; and (c) in portion (3) relating to Saskatchewan, deleting section 9 thereof and deleting in section 12 the words "and fish" and "and fishing" wherever they appear therein.

Other Statements on Fisheries Jurisdiction

THE CANADIAN BAR ASSOCIATION

In 1978 the work of the Committee on the Constitution of the Canadian Bar Association (CBA) was published by the Canadian Bar Foundation: *Towards a New Canada*. Recommendation 3 in Chapter 19 dealing with economic powers and resources states (p. 107):

3. The federal Parliament should have exclusive legislative power respecting seacoast fisheries; the provinces should have exclusive legislative power respecting inland fisheries in the province.

In attempting to explain why this course of action is advisable, the report (p. 109), refers to the fact that fisheries regulation up to that point in time exhibited "considerable cooperation" between the two levels of government but that "the lack of confrontation may be drawing to a close as interest in problems of pollution, land reclamation and management of water as a resource expand." The CBA then says: "By and large, the federal presence here probably merely complicates provincial planning regarding other uses of water. There seems little point in concurrency here." The report also notes the connection between fisheries and pollution and comments that pollution "should be dealt with in its own right. Thus insofar as pollution is confined to a province, it should be regulated by the province." To place the CBA's fisheries recommendation in context, fisheries is seen as part of the natural resource base of the province. Just as ownership of and legislative jurisdiction over natural resources in the provinces are, or should be, exclusively provincial, so should fisheries. This is at least to the extent that the fisheries are regarded as the subject of private rights stemming from the ownership of the bed underlying water in the province, i.e., the non-tidal fishery. The CBA report neglects the fact that "inland fisheries" is usually regarded as including tidal bays and estuaries as well as non-tidal areas.

THE QUEBEC LIBERAL PARTY

In 1980 the Constitutional Committee of the Quebec Liberal party published *A New Canadian Federation*. Item 9 of Recommendation 21 states (p. 98):

9. The constitution should allocate to the provinces the right to manage and regulate interior and coastal fisheries provided that the provinces' coastal fisheries be subject to the federal government's jurisdiction over navigation, protection of the species and the environment.

The Quebec Liberal party's position, like that of the CBA, is premised on the view that fisheries is a natural resource and that provinces should have paramount control over their natural resources. It should also be

appreciated that the proposal envisages placing the territorial sea of Canada within provincial boundaries, with the five easternmost provinces agreeing as to how to draw their boundaries in the Gulf of St. Lawrence and the Atlantic Ocean. It appears that fisheries outside the territorial bounds of the provinces would still be subject to provincial control, just as the party proposes for mineral resources.

The opposition accorded to federal measures to protect the species is of considerable interest. The report recognizes that the "granting of this jurisdiction does carry the danger [of] an invasion into areas of provincial competence," and, therefore, "federal competence in the matter of the protection of the species should be strictly limited to that matter."

THE TASK FORCE ON CANADIAN UNITY (PEPIN-ROBARTS REPORT)

The Pepin-Robarts Task Force on Canadian Unity in *A Future Together: Observations and Recommendations*, does not attempt a detailed consideration of fisheries. It does, however, attempt to deal broadly with what matters should be federal and what provincial. In the course of doing this, fisheries are mentioned. Little doubt appears in the commissioners' minds: fisheries should be provincial. The three key paragraphs of the report dealing with these issues are (p. 85):

The revision of the distribution of powers must respect the need for a central government that can handle problems of Canada-wide importance and maintain a viable Canadian federation, for provincial governments that can handle regional and provincial concerns for local prosperity and preferences, and for the Quebec government to maintain and develop its distinct culture and heritage. In meeting these needs the principles of power and benefit sharing, regionalism and dualism which we identified earlier are fundamental.

We see the essential role and responsibilities of the central government as being to sustain, encourage and symbolize a Canadian identity and pride, to ensure the security and preservation of the Canadian federation, to have an overriding responsibility for the conduct of foreign policy, to control the major instruments of economic policy, to oversee interprovincial and international trade, and to stimulate economic activity within the federation. In addition, because the resources and economic advantages of Canada are not spread evenly throughout the country's ten provinces, the central government must be in a position to assure equitable benefit sharing for all Canadians. This means that it must have a responsibility for combatting regional disparities, establishing appropriate minimum standards of living for all Canadians where appropriate, and redistributing income between individuals and between provinces.

We see the essential role of the provinces as being to take the main responsibility for the social and cultural well-being and development of their communities, for the development of their economies and the exploitation

of their natural resources, and for property and civil rights. This implies exclusive (or occasionally concurrent) jurisdiction over matters pertaining to culture, education, health, social services, marriage and divorce, immigration, manpower and training, the administration of justice, *natural resources including fisheries*, regional economic development, trade within the province, consumer and corporate affairs, urban affairs, housing and land use, and environment. It implies, as well, correspondingly adequate powers to tax. The provincial governments should also have the right, as long as they abide by Ottawa's overriding foreign policy, to establish some relations with foreign countries and to sign treaties in matters coming under their jurisdiction. [Emphasis added]

Thus the Pepin-Robarts Report regards fisheries as provincial, on the basis of its being a component of natural resources. Likewise the relationship between fisheries and social and cultural affairs and community and economic development could be emphasized in order to demonstrate an appropriate provincial role in fisheries decisions.

INDUSTRY

All sectors of the fishing industry have unanimously supported a position of federal paramountcy.³⁸ The concern seems to have been, and to be, that any other position would result in a balkanization of the fishery that would lead to management chaos, presumably in both corporate and fisheries management. This concern seems to focus on the management of fin fish in marine waters, without directing attention to whether shellfish and freshwater fisheries should be treated in the same way. Also, one should be cautious in accepting this view as representative of that portion of the fish industry represented by aquaculture. In Nova Scotia, for example, there has been industry support for a new aquaculture act³⁹ that envisages the province playing the leading role in aquaculture development and management.

The Fisheries Council of Canada, for example, issued a press release on February 26, 1979 in which its executive director stated:

The present constitution provides the best and most realistic division of powers between the federal and provincial governments and the Fisheries Council of Canada is strongly opposed to any change. If the federal authorities would concentrate their efforts on the management of the stocks and provide for real consultation with the Provinces and the industry on the management of the fishery, the need for a confrontation on constitutional powers would disappear.

A later memorandum (September 3, 1980) refers to "the industry's strong feeling that sea coast fisheries, anadromous species and habitat protection must remain in federal hands," and a September 5, 1980 press release gives the reasons: "a mobile resource, a tradition of fishing by

fishermen throughout the Atlantic region, international aspects and the crucial importance of habitat protection."

The Eastern Fishermen's Federation (EFF) is the largest group of fishermen in Atlantic Canada, representing 17 independent fishermen's groups and some 10,000 fishermen. It issued a press release on September 5, 1980 supporting Nova Scotia "in its call for firm federal control over fish stocks" rather than Newfoundland, New Brunswick and Prince Edward Island in their request for shared control. The president of the EFF stated: "Fishermen want to speak with one voice, to just one government. We couldn't support the sharing of jurisdiction because too many cooks will spoil the soup." Also referred to was the fact that neither fish nor fishermen respect provincial boundaries.

Harmonization of Fisheries Policy: The Foundations

In my judgment the discordant element in existing fisheries policies that must be addressed in any effort to effect federal-provincial harmonization is the social and economic impacts of management decisions upon the provinces. Invariably, the provinces, in making their case for constitutional change and others in examining the issue, point to provincial dependencies on and local aspects of fisheries decisions. Unquestionably, federal controls go beyond the biological and scientific aspects required for preservation and conservation of the resource; the federal government makes allocational and distributive decisions as well. As soon as management policies dictate that limits must be placed upon harvests, decisions must be made as to who is to be included and who is to be excluded in the harvest, and how much is to go to each participating individual or candidate group. How much groundfish is to go to the inshore, and how much to the offshore fleets? How much is to go to longliners and how much to trawlers? Are Nova Scotia vessels to be allowed in the Gulf of St. Lawrence? How much salmon is to be harvested by the Indians, or by sports fishermen? How much fish is to go to the large, now restructured, fishing companies? These are just a few of hundreds of allocational decisions made by the federal fisheries authorities (albeit with some degree of consultation with user groups and the provinces).

How do these decisions impact on the provinces? Jobs are central. Tens of thousands of people depend on the fishery, and they all live in one province or another. The way in which quotas are assigned affects the total number. Trawlers are more capital intensive than the inshore vessels but require less manpower per ton harvested. Which is favoured: utilization of more capital or more labour? Processors require continuity of supply, but the way in which quotas are assigned and seasons fixed affects supply. Again, should vessels with processing and freezing capacity be allowed to operate on the coasts? The impact on shore-

based processing is self-evident and under the existing structure, the federal government makes this decision.

Provincial income is, for the major fishing provinces, heavily dependent on the success of the fishery. Obviously, taxes are paid by the individuals and corporations profiting from the fishery. Equally significant is the fact that fishing is a local industry. Provinces engage in industrial promotion. They provide promotional subsidies and loans to harvesters and processors, spend money on infrastructure such as ice-making and freezer facilities, and engage in research and development activities. In addition, the sale of the product in export markets will influence the flow of money into the province. Arguably, fishing is as much a local trading activity as the insurance⁴⁰ and brewing⁴¹ industries and as such, a primarily provincial responsibility.

Provinces provide public services to communities, and they must be able to plan these services in the expectation that these communities will be viable in the future. Even more than agriculture, the fishery is unique in the concentration of its participants in small, isolated areas. What will happen to the hundreds of small communities dependent upon the inshore fishery? Some might argue that they are inefficient, yet they provide a way of life on which many are dependent and which many prefer. Fisheries management decisions will determine what happens to these communities. Meanwhile, the provinces and their municipal subdivisions must decide about road, schools, hospitals, water and sewage, police and other public services.

To focus the issue by taking another perspective, consider this fact: all of the key components of the fishery as an economic activity are tied to a province and its land base. Fishing vessels, for example, are docked, depart from and return to a port in a province. In many cases, certainly for the inshore fishery, vessels are built in that province. The crews normally live in the province and raise their families in local communities. Equipment is likely to be supplied locally and is often produced or manufactured in the province. The fish is landed in the province and processed in plants located there. The processed fish is sold to local consumers or prepared and packaged for export, frequently to be transported by locally based trucking firms. It just so happens that part of the local labour force (the part engaged in harvesting) goes to work on a vessel that goes to sea for a day or two, or a week or two at a time, and that the bulk of the product eventually enters extraprovincial trade.

Taking this analysis as the first foundation for evaluating fisheries policies and jurisdiction, I suggest that greater harmony would be achieved by trying, as much as possible, to isolate socio-economic decisions from conservation and preservation considerations, leaving the former to the provinces. I do not believe that, in practice, conservation and preservation decisions can be totally divorced from the socio-economic context. However, a better job could be done of rendering to

the provinces those things, e.g., local industrial development, that are provincial. Central to that is responsibility for the social and economic development of the provinces from the resources at hand.

The second foundation for a realignment of federal-provincial fisheries roles is the recognition that many fisheries have interprovincial and, indeed, international aspects. Societies are organized partly by the drawing of boundaries. International law recognizes nation-states and draws geographical lines around them. We, as a federal state, organize ourselves into provinces and place geographic boundaries around each province. Despite discussion and dispute as to where in our coastal waters we draw provincial boundaries, no one doubts that a line can and should be drawn. Fish, however, like other wild creatures, do not respect these man-made boundaries, wherever they may be; they follow their own instincts and move under the influence of biological, chemical and physical factors. Because the interrelationships are so complex, our information so minimal, and life cycles and migration routes so obscured and difficult of access in the watery medium, and because most of the tidal fisheries are outside any province, we cannot simply render unto a province its fish. Where this can be done, it ought to be, but it must be recognized that, in most cases, to think of particular fish as belonging to a particular province is to indulge in an inaccurate oversimplification. It is the federal government which should be assigned responsibility for adjusting the interprovincial, extra-provincial, and international components of the fisheries.

Accepting these foundations, it is now possible to point out what appear to be flaws in many of the existing proposals for reform of federal-provincial roles. A common way to approach the problem, represented for example by the Canadian Bar Association recommendation, is to use as a line of distinction "seacoast" as opposed to "inland" fisheries. The expression "inland" is often equated with freshwater, although more technically it includes tidal waters inside the baseline from which the territorial sea is calculated and bays that have historically formed part of a province, such as the Bay of Fundy. In any event, a tidal/non-tidal or seacoast/inland distinction, while having the apparent virtue of simplicity, does not, in fact, address adequately the concerns embodied in the suggested foundations for realignment. For example, it ignores the social and economic consequences potentially visited upon the provinces by fisheries management decisions affecting tidal waters. In the case of the non-tidal fisheries, a system of exclusive provincial control ignores the problems posed by anadromous and catadromous fish (collectively referred to as diadromous) such as salmon and eels which migrate between fresh and salt water. Indeed, while in salt water these fish often move through waters adjacent to more than one province and into areas clearly outside any province, often into areas completely outside Canada and its 200-mile Exclusive Economic Zone (EEZ). Sim-

ilarly, the solution is not sensitive to the impact that water management and quality decisions touching on freshwater may have on tidal fisheries. Estuaries are extremely productive nursery areas for many marine species, and pollutants finding their way into the coastal margins have been found in fish many, many miles into the offshore.

Another solution, proposed, for example by Alberta in 1978, is to make fisheries an area of concurrent jurisdiction, with paramountcy residing with one level of government or the other. Most provinces favour provincial paramountcy; the federal government, federal paramountcy. Neither suggestion, however, would accommodate the foundations outlined above. Federal paramountcy could perpetuate all of the present problems by allowing the federal government, in the final analysis, to make decisions of a distributional nature. Provincial paramountcy would permit each province to do as it wished in relation to all stocks regardless of interprovincial, extraprovincial or international connections. In the absence of unprecedented federal-provincial agreement *and* interprovincial cooperation, a system of provincial paramountcy would spell ruin for the fisheries.

The July and September 1980 federal-provincial conferences produced a serious and reasonable series of proposals and responses concerning fisheries jurisdiction. Their work is particularly useful in that they get down to specifics by suggesting draft provisions and they recognize the complexity of the problems by trying to draw distinctions that treat different things differently. Furthermore, they appear in large part to have built upon the foundations suggested above, although they do not carry them to their full consequences. However, because they offer a valid starting point, I will try to make my own proposals clearer by contrasting them with the positions taken in 1980.

A New Alignment

Taking the foundations set out in the foregoing section of this paper, my discussion and proposal will be premised upon an attempt to render unto the federal government those matters relating to protection and conservation of fisheries for the benefit of all provinces and the nation as a whole, and unto the provincial governments those fisheries matters relating to the intraprovincial distribution of wealth and the social and economic development of the respective provinces. Consequently, I suggest the following:

1. That the federal government have exclusive legislative authority in relation to the preservation and conservation of all marine fish (except non-migratory molluscs), marine animals, anadromous and catadromous species of fish and transboundary stocks of freshwater species. Complementary to control over these fish and animals would be responsibility for their habitat, including water quality. It is

intended that preservation and conservation be narrowly defined so as to include: (i) controlling the amount of harvest to ensure, at a minimum, that the maximum sustainable yield is not exceeded and probably that a lesser amount — an optimum sustained yield — is harvested in line with building stocks and capturing the most resource rent; this would be done by setting TACs on a species-by-species and stock-by-stock basis; (ii) dealing with methods of harvesting that may be destructive to fish; and (iii) setting minimum sizes and seasons for conservation purposes. It is also intended that each TAC be divided by the federal government on a province-by-province basis so as to achieve equity between the provinces. Quotas ought not to be assigned by the federal government by sectors, gear, enterprise or otherwise; intraprovincial distribution of each provincial quota is for that province. Licensing would be a provincial matter, but enforcement of the entire structure would be a federal concern. Similarly, fish habitat and the deposit of substances deleterious to fish would be federal matters insofar as the activity is likely to affect water containing fish under federal protection. This could include a deposit initially made in freshwater. International concerns would obviously be federal.

2. That each provincial government have exclusive legislative authority in relation to non-migratory molluscs (excluding squid) and stocks of freshwater species confined to the province. This would include all matters related to conservation and protection, harvesting, allocations, sale within the province, environmental protection and whatever else is connected.
3. That each province have exclusive legislative jurisdiction over the distribution of its percentage of each TAC set by the federal government, including the licensing of fishermen and vessels and control for socio-economic objectives on method of capture and seasons. The province would be able to deal with points of landing, sale of fish (even if caught outside the province), labour relations in the provincial fishing industry, processing and local marketing.
4. That aquaculture, as a private-property based, local business activity, be under exclusive provincial control. Such provincial control would, however, be subject to overriding federal concerns related to protecting the wild fishery and to shipping and navigation and extraprovincial marketing. Aquaculturists would be provincially licensed and could receive leases of subaquatic lands from the provinces for aquaculture purposes. While the federal government could spend its money on research and development, providing financial assistance and promotion of aquaculture, the main responsibility for promotion, development and control would be provincial.
5. That marine and aquatic plants which are, figuratively speaking, the forests of the lakes and tidal margins, be under exclusive provincial

control, except where limitations on the amount and manner of harvest are necessary to protect fish under federal control. Plants are part of the fish habitat; they provide nursery areas for fish and organisms and for processes beneficial to fish. On the other hand much of the plant resource can be safely harvested, and this resource is rooted to and should be regarded as part of the land base of the province. Plants should be presumed provincial, to be overridden only by federal concern for fish resources under federal protection.

6. That the provinces have exclusive jurisdiction to authorize fishing within three miles of their coasts. The purpose of this suggestion is to allow a province to limit access to waters relied upon by its inshore fishery to inshore fishermen. This would have nothing to do with management of the fish stocks in those waters; it would be a federal responsibility as outlined in paragraph 1 above. It would simply follow the example of the EEC in limiting access (which would otherwise be unrestricted with regard to the province of origin of the fishing unit) based on the special needs of a province's inshore fishery.

The proposals of the 1980 conferences will now be discussed in order to provide a basis for comparison.

Inland Fisheries

While the 1980 discussions use the term "inland" as a convenient shorthand expression mimicking the terminology in the existing s. 91(12), it is clear from s. 92.1(1)(a) of the "Best Efforts Draft" (reproduced earlier) that they are utilizing tidal/non-tidal as the basic distinction. All provinces and the federal government appeared to agree that this area should be exclusively provincial to the extent that these fisheries are confined to a single province. All actors seemed to agree that anadromous species must be dealt with separately. Former Prime Minister Trudeau added caveats related to the protection of native rights and fish habitat in interprovincial and international waters. Except for the qualification mentioned in the next paragraph, I believe that the 1980 proposals are consistent with my own.

Presumably, the reference to fish habitat in interprovincial and international rivers would extend to the deposit of deleterious substances into such waters. What seems to be overlooked, and it is a subject of serious concern, is the whole question of pollution in the freshwater resources of a province impacting on fisheries that are not confined to a province. Generally speaking, all waters interconnect, and one can expect many forms of pollution to be carried downgrade from a water source in a province to interprovincial or international waters or to the oceans. Similarly there is little point in speaking about protecting ana-

dromous fish without ensuring that water quality and their habitat are protected also; the same applies to catadromous species.

Marine and Aquatic Plants

The provinces sought exclusive jurisdiction over plants in the freshwater and in tidal waters in or adjacent to the provinces. Adjacent was not defined. The federal government was reluctant to agree to this because of the role of plants as part of the habitat of fish. My proposal has attempted to accommodate these views. The practical effect of the proposal would be to make plants a matter of day-to-day concern for the provinces, with the federal government doing some monitoring and research and consulting with the provinces where concerned. The federal role would be akin to setting a TAC for plants.

Sedentary Species

All actors, including the federal government, were ready to assign sedentary species to the provinces. These were not defined in the proposals, although they clearly include clams, mussels and oysters. Controversy surrounds the definition of the term "sedentary." Because of this, the draft suggested by federal officials would clarify that crabs, lobsters and scallops were not included.

Presumably, the rationale for unanimity on this question is the belief that the geographic immobility of the species means there are no inter-provincial, extra-provincial or international questions posed. This would seem to be the case for clams, oysters and mussels but is not likely the case for scallops, lobsters or crabs. My proposals have followed the 1980 position but have attempted to get over the definition problem posed by the term "sedentary" by specifying that provincial control applies to non-migratory molluscs. "Mollusc" is defined in *Webster's Third New International Dictionary* as "one of the Mollusca: shellfish." Mollusca is a phylum of invertebrate animals that include the chitons, tooth shells, snails, mussels and other bivalves, squid and octopuses and related forms. Clearly, commercially important shellfish such as clams, oysters, and mussels would be included, as would gastropods like abalone. Scallops would also be included. However, this is of no great concern, since what is really being given to the provinces is only control within the province, and most of the important scallop beds, like Georges Bank, are outside any province. Some molluscs, such as squid, are migratory and, hence, no respectors of boundaries. Here, provincial control would be inappropriate. Only where species of molluscs impact significantly outside local areas should they be of federal concern.

Aquaculture

Again, unanimity seemed to prevail in 1980 that aquaculture should be assigned to the provinces — presumably because it was seen as an activity confined to them. It is a private-property-based, local trading and business activity distinct from the wild fishery. It should be recalled, however, that provincial regulatory power would still be subject to overriding by federal initiatives aimed at fish health (to protect the wild fishery) and shipping and navigation, as well as by extra-provincial marketing requirements.

Seacoast Fisheries

In 1980, nine of ten provinces wanted at least concurrent jurisdiction over marine fisheries, while the federal government and one province were opposed. The federal government did offer “much closer consultation” in this area and was prepared to entrench a mandatory provision to that effect in the Constitution.

The provincial position as evidenced by the “Best Efforts Draft” (reproduced earlier) would allow both levels of government to enact “laws relative to the sea coast fisheries” (the word “exclusively” is not used) and then specifies certain matters for federal paramountcy and certain for provincial. The federal list consists of three items: “fixing parameters” for the TACs for stocks, allocating quotas to foreign countries and licensing foreign vessels, and “conservation of fish stocks.” The provincial list had two particular items: fixing catch levels within the federally determined parameters for TACs and issuing quotas up to that level, and licensing domestic fishing vessels. A third item, a residuary clause, made everything else provincial.

Two important questions are raised by this approach. First, does the provincial fisheries power extend throughout the 200-mile EEZ without regard to provincial boundaries? Second, how are the provinces to divide the TACs among themselves? The suggestions of the nine provinces in agreement are, first, to refer to stocks “adjacent to each province” without definition or elaboration, and second, to rely for allocation upon “agreement between the Provinces in accordance with equitable principles taking account of all relevant information including traditional fishery patterns.” Arbitration is suggested if agreement cannot be reached.

My proposals for the harmonization of fisheries in tidal waters take a different approach to both of these questions. With respect to the first, any boundaries in tidal waters may prove to be terribly artificial and inappropriate if based on our current state of knowledge. If enough information was available for constitutional responsibility to be assigned

on a stock-by-stock basis (species-by-species would not be detailed enough), some stocks of marine fish might be so "adjacent" to a province and so localized that their management would be appropriately provincial. However, my assessment is that any attempt to do this now would be unrealistic. Hence, I would reject any fisheries solutions geared to provincial management (other than that of non-migratory molluscs) based on boundaries in tidal waters. On the other hand, I would support reserving areas, say within three miles of the territorial sea's baseline, exclusively for that province's fishermen. This does not mean that the stocks would be placed under provincial control; it would simply mean that commercial fishermen from other provinces would be kept at least three miles from any land (*terra firma*) or island forming part of a province.

With respect to the second matter, the division of a TAC, I would, in effect, make the federal government arbiter. (This would include allowing the federal government to decide, first, what divisions should be created to manage species by stocks, and second, the appropriate TACs for those stocks; the federal government would not be restricted simply to "fixing parameters" for TACs.) Undoubtedly, dividing up TACs into quotas by province will prove controversial. The process will be extremely complex and will likely generate acrimony. If the provinces were to take a strong and unified stand against the federal government playing this role, it might be better to rely on provincial agreement and independent, outside arbitration to settle differences. The provinces would, in any case, be deeply involved in negotiations and the search for points of agreement. If arbitration were deemed more desirable, it would have to be compulsory with time limits and rules for imposing binding constraints on what might otherwise be too open-ended a process. The desirability of having arbitration as an ongoing, annual process is questionable. Perhaps once initial allocations are made, the federal government can take ultimate responsibility for any fine-tuning that may prove necessary.

Achieving equity among the provinces will prove complex in practice. This may simply arise as a result of bargaining strategies, each seeking as big a share as possible. It will, no doubt, also have to do with extracting and organizing sufficient information to make out a case. On the other hand, it is possible to set out a few principles that ought to guide decisions. The following are suggested:

1. For established fisheries, basically everything commercially utilized in Canada, traditional patterns of exploitation should be continued. Thus, information on total landings by province for each species could be examined in order to try to achieve overall percentages for each province from this base. It would likely be appropriate to fine-tune this information as much as possible so as to determine where fishermen from a particular province have traditionally fished. This

will be relevant, since TACs are determined on a stock-by-stock basis, and this will entail geographic considerations.

2. New stocks, newly exploited species and expanded TACs may pose greater problems. All coastal provinces wanting to share should be able to, based on the principle of equal access. This is a cornerstone of the Common Fisheries Policy of the EEC. Geography might be relevant, however, on the basis of promoting efficiency by preferring the closest province, which ought to have the least costs in exploitation. However, existing capital structures in terms of harvesting and processing capacity and the availability of markets are also appropriate considerations.
3. Existing structures must be respected. The Canadian fishing industry is generally regarded as over-capitalized. Allowances must be made to permit the rationalization of the capital now invested even if, in the longer term, provincial quotas should be allocated in a different way. In other words, transitional quotas might be desirable.
4. Initiative must be rewarded. A province, or individuals from a particular province, may wish to harvest under- or unexploited stocks. They should be able to receive in advance a quota assignment (this is an argument for federal decision making rather than arbitration as a means to resolve quota allocations) and some preference to serve, perhaps, in the future as a reward for innovation.

It is of interest to note that the American *Magnuson Fisheries Conservation and Management Act* deals with a similar problem, that of limited access fisheries, by requiring in s. 303(b)(6) that the regional councils and secretary of commerce "take into account":

- (A) present participation in the fishery,
- (B) historical fishing practices in, and dependence on, the fishery,
- (C) the economics of the fishery,
- (D) the capability of fishing vessels used in the fishery to engage in other fisheries,
- (E) the cultural and social framework relevant to the fishery, and
- (F) any other relevant considerations. . . .

Once an equitable distribution of the TACs to the interested provinces has been accomplished, the internal allocation to fishery persons, be they individuals or corporations, can be accomplished as each province sees fit. This can be done on the basis of provincially determined priorities. The fishery either as jobs and a way of life, or as integrated corporate structures intended to achieve efficiency through technology and economies of scale, can be promoted. Each province can devise its own blend of social and community assistance, cultural and lifestyle values, and larger-scale, more centralized, more capital-intensive operations. Each province can do this with no fear that its share of established TACs will be eroded in favour of other provinces, although new oppor-

tunities might be lost. Perhaps only in the event of under-utilization of quotas ought shares to be diminished.

A Native Fishery

Small-scale fishing, like hunting, has traditionally formed part of the lifestyle of another user group: the aboriginal inhabitants of Canada — the native peoples. It is not only the provinces with small outports and coastal communities which can muster a persuasive argument for priority based on traditional usage: Canada's native peoples have for hundreds of years engaged in fishing as an important component of their search for subsistence in an inhospitable environment. This special connection justifies recognizing native peoples in any reordering of the Constitution. This is especially so under the scheme advocated herein.

Under my proposal, all that the federal government does of an allocational nature is to determine provincial quotas. The provinces decide local distribution and since, under our existing Constitution, Indians and Inuit are a federal responsibility, it seems unlikely that the provinces would readily distribute benefits to native peoples. I therefore recommend reserving from appropriate TACs sufficient fish to allow for a native harvest.

While it is perhaps more fitting to deal with native peoples as a separate entity and discuss all issues together (particularly the question of a resource base to support a form of self-government), the relation of native peoples to fisheries makes it imperative that they not be overlooked in any attempt to harmonize fisheries policies.

I propose allowing for native quotas for appropriate TACs. Appropriate refers to stocks traditionally exploited by native groups. River fisheries for salmon, shad and eels are examples and if TACs were set, as proper management would dictate, on a river-by-river basis, then a native group with a connection to a particular river could be given a right to harvest a certain quantity. As with the provinces, the decision as to which person gets rights, or how harvest is to take place can be made by the native group, subject to federal enforcement to ensure quotas are not exceeded. It ought not to be of concern whether the product harvested is sold rather than consumed — the native peoples ought to be able to decide on the highest and best use of their quota. An interesting possibility in this context is that of an Indian Atlantic salmon quota, used to set up an Indian-controlled recreational fishery. Thus, a recreational angler might willingly pay for Indian lodging and an Indian guide if, as a result, he could catch more fish on a daily or seasonal basis than under the normal Atlantic salmon regulations. In 1984 in New Brunswick, sports anglers will not be able to kill multi-sea-year salmon, i.e., it will be a grilse-only sport fishery; they will be limited to one fish a day (even if released), and they will have a season limit of ten fish killed. If, as seems

likely, Indians are permitted to catch multi-sea-year fish, with a maximum quantity, could they not more efficiently harvest their quota by selling Indian rights to fish to non-Indian anglers?

Possible Economic Consequences

What are the potential economic gains and losses of my proposed alignment? At first sight, there are perhaps no gains and potentially great losses, since it can be said that fisheries is now under a regime of strong central control allowing for a comprehensive, coordinated policy unencumbered by any concerns except maximizing economic gains. This might be desirable in theory for the potential it offers, even if the track record of the federal government is to the contrary; much of the resource rent has been dissipated by the costs of administration and an emphasis on social objectives.

One possible flaw in this argument for strong central control stems from the need to create property rights in order to diminish economically wasteful competition. Both the influential Kirby and Pearse reports on the Atlantic and Pacific fisheries, respectively, recommend moving from the existing system of common, public fisheries in tidal waters to a regulatory system based on private rights.⁴² This would be accomplished by creating transferable rights to catch a given quantity of fish. These rights, often referred to as quasi-property rights, would privatize the public fishery by creating enterprise or individual allocations, just as would breaking up a common pasture into individual plots. The economic justification for this is principally to avoid over-capitalization. In a public fishery, especially one with a TAC, and even if entry is limited, participants have an incentive to catch as much as possible as quickly as possible. Pressures develop for bigger and faster boats and more technology to better an individual's competitive position. With everyone engaging in this, more and more money is spent to harvest a relatively constant amount of fish; costs go up while revenues remain relatively static.

While harvesting controls based on property rights have widespread support, a constitutional law question, alluded to earlier in the section on the fisheries power, arises: has Parliament the power to create these property rights? The problem stems from the distinction made (in the cases mentioned in the earlier section of this paper dealing with the fisheries power) between the power to regulate for conservation purposes (the federal fisheries mandate) and property rights in the fishery. Property rights are clearly a provincial matter in non-tidal waters, but what of tidal areas? The fishery in tidal areas since *Magna Charta* in 1215 has been the subject, not of private rights, but of a common-law public right, common to all citizens. The cases make clear that only the federal government can regulate the public right, but a system of individual

quotas arguably goes beyond this to extinguish the public right and to replace it with newly created property rights. Can this be done? A further refinement stems from whether the property rights are within the provinces, either because the fish are caught within the physical boundaries of the province or because the rights themselves are regarded as being within a province. One advantage of this proposal is that de jure creation of property rights could be provincial, removing any possible constitutional criticism. This might result in a substantial economic gain not otherwise achievable without either some other constitutional amendment or close cooperation by the provinces. Even the possibility of federal-provincial agreement might be inadequate if challenged by a disgruntled individual frozen out of the initial distribution of rights.

Two additional arguments against exclusive federal control of the fishery stem from the importance of individual responsibility and the value of diversity. First, one might contend that giving each province a resource base to husband is analogous to the shift from a common fishery to a private one. Arguably, if all the gains to be derived from making efficient use of a resource accrue to the province as owner rather than to all provinces, the incentive associated with self-interest will result in better decisions. Perhaps the provinces will care more about the fishery and simply try harder.

The second argument stems from the value of diversity and experimentation. With each province pursuing its own course of action, the range of local conditions can be better accommodated than through a more rigid centralized structure. Further, each province may be expected to take different tacks in weathering the problems posed by the fishery. As each province experiments with its own solutions, gains may be achieved through experience. After all, market mechanisms are usually lauded because of their ability to permit free choice and a range of individual decisions, some successful and some not, so as ultimately to develop the mix of factors that results in maximum gains. Centralized control allows only one great experiment, with the possibility of spectacular failure. Certainly, it would be difficult to argue that a very efficient fishery has developed in Canada under central control, although this failure was, no doubt, influenced by stock depletion — the result of pre-1977 foreign overfishing. One might also note the principle that diversity adds to stability, and our centralized fishery is not noted for its stability.

The identical point about diversity was made as recently as 1982 by the American National Advisory Committee on Oceans and Atmosphere (NACOA). In its report on national ocean goals and objectives for the 1980s, *Fisheries for the Future: Restructuring the Government-Industry Partnership*, NACOA states, in the Preface:

In no way do we seek nor advocate a plan for centralized control over fisheries, nor do we subscribe to the notion that a uniform, comprehensive

program for all U.S. fisheries is either desirable or feasible. Rather, NACOA encourages the pluralism and competition within and among the industries and interests.

The value of diversity has frequently been the subject of recent comment.⁴³

Atlantic Salmon: An Illustration

Having outlined a suggested realignment of fisheries powers, I will now consider how it would work out in the case of a particular species. Atlantic salmon was selected because it illustrates a very considerable and complex range of problems, all of which any fisheries scheme must be able to accommodate.

The life cycle of Atlantic salmon begins with the deposit of eggs and milt by mature female and male fish in the gravel beds of freshwater streams. After a winter in the gravel, the eggs hatch into yolk-sacked alevins which soon in turn become parr. After one or two years in the freshwater environment, the parr take on a silver colouration and migrate to sea as smolt of four to six inches in length. Remarkably the smolt are able to withstand the transformation from a freshwater to a saline marine environment. The salmon migrate in the oceans, foraging for one year or several, over greater or lesser distances. The multi-sea-year fish often travel as far away as Greenland; the single-sea-year grilse usually remain in Canadian waters. The southwest coast of Newfoundland is thought to be a congregation area for grilse; the fish from Bay of Fundy rivers are thought to remain largely in that bay. During these migrations, out to feed and back to the home rivers to spawn, the fish may pass along the coast adjacent to other provinces. Indeed there are, undoubtedly, Atlantic salmon from rivers in the United States which pass through Canadian waters, e.g., adjacent to Nova Scotia. Traditionally, the Atlantic salmon has been harvested commercially in the salt water and has been, when in the fresh water, the subject of a major recreational fishery, where it is considered the king of sports fish.

The possibilities for conflict are not difficult to imagine. At the international level Canada must deal with other nations harvesting, on the high seas, salmon originating in Canadian rivers or, as is a more current problem, other nations harvesting such salmon while in the territorial seas and EEZs of those states. Notable in this respect are Greenland and the Faeroe Islands. Similarly, Canada must deal with the United States, which complains about Canadians harvesting salmon originating in U.S. rivers.

A second level of problems are those between provinces. New Brunswick and Quebec in particular, and Nova Scotia to a lesser extent, complain that Newfoundland commercial fishermen decimate stocks from their rivers as they pass or congregate near Newfoundland.

At a third level, there are further conflicts once the salmon return to

the waters adjacent to their home province. Three legitimate user groups (a local commercial fishery, a native peoples' fishery and a sports fishery) and one illegitimate (poachers) all vie for a share of the resource. These conflicts are particularly intense now that the wild Atlantic salmon stocks appear to be in a very poor state, having provided, with limited exceptions, a dismal catch in 1983.

It should also be noted that Atlantic salmon are an important subject of aquaculture activities (some Canadian production exists, but it is dwarfed by very significant Norwegian cage production).

In each of Nova Scotia, Newfoundland, Quebec and particularly New Brunswick, Atlantic salmon are the subject of a valuable sports fishery. In addition to the social and cultural benefits it brings to the citizens of these provinces, the sports fishery is also an important economic generator. Not only are considerable funds turned over through the purchase of boats, motors, and tackle and the provision of accommodation, meals, guides and other services, but much additional money is brought into these provinces by tourists drawn by the prospect of hooking a superb game fish.

Tourism is a significant industry in the Atlantic Provinces and an area of clear provincial interest. An Atlantic salmon caught as a sport fish is more valuable to the province than one caught by a commercial fisherman and sold as food. A province might well choose, if it could, to allocate its share of this wild resource to the sports fishery in preference to the commercial.

Applying my suggestions for realignment, the problems posed by Atlantic salmon would be handled in this way:

1. The federal government would decide on appropriate definitions for Atlantic salmon stocks. It might do this along purely biological lines by saying that each river has its own stock (there would then be several hundred) or, perhaps, by lumping together regions, e.g., Bay of Fundy, Gulf of St. Lawrence, Atlantic coast, Labrador, or perhaps by province.⁴⁴ The way this is done would have important ramifications for other steps in the process. Consultation with the provinces would be highly desirable.
2. For each stock defined, the federal government would set Total Allowable Catches (TACs). This would be done to ensure the proper conservation and preservation of the stocks. It might, for example, prohibit the harvesting of multi-sea-year salmon for some stocks, but allow X tonnes of grilse to be captured.
3. Any other conservation and preservation measures necessary would be enacted by the federal government. This would include, for example, specifying methods of harvesting designed to prevent destruction of juveniles, the wounding of fish and poaching. Similar would be controls related to health, such as fish transportation and inspection and the introduction of foreign species. Enforcement of quotas and regulations would continue as a federal responsibility.

4. The federal government would also have the power to protect the salmon's habitat. The vitality of the stock is dependent on the maintenance of water quality, gravel beds and the general environment of the fish. These same matters would be subject to the concurrent jurisdiction of provinces over their environment, with the normal doctrine of federal paramountcy applying.
5. The federal government (or the provinces by agreement or arbitration) would divide each Atlantic salmon TAC among the provinces and native peoples. Thus, provincial and native quotas would be established.
6. Each province would decide upon what to do with the share of the TAC allotted to it. Different provinces might decide to do different things: some might wish to harvest only through a recreational fishery, with a greater or lesser fee attached; others might opt for a combination of commercial and sports fishing. Some might experiment with more radical, but intriguing ideas such as allowing commercial harvesting only at a river mouth or estuary (thus eliminating inadvertent harvesting of stocks from other rivers) or allowing capture only by the sports fishery but requiring the fish to be turned over to the province to market as a further source of provincial revenue.
7. Atlantic salmon aquaculture would be licensed and regulated by the provinces, subject to federal concerns with fish health, navigation, real public federal property and extra-provincial trade.

Implementation

There are three suggested ways of implementing needed changes in the distribution of fisheries functions: constitutional amendment, federal-provincial consultation and delegation of powers.

Much of the debate about fisheries powers concerns the need for constitutional amendment. From the standpoint of most provinces, such amendment would be the optimum outcome. Constitutional entrenchment, however, is at one end of a spectrum. At the other end is greater consultation with the provinces by the federal government. This, for example was the solution offered in former Prime Minister Trudeau's 1980 response to provincial proposals for a provincial role in seacoast fisheries. Somewhere between lies delegation, the technique by which a higher level of government (in this case the federal) authorizes a lower (the provincial) to administer areas under its control. Of course, a mix of the three approaches could be chosen. For example, there could be a constitutional change to give the provinces authority over molluscs, delegation of authority over inland fisheries, and greater consultation over fin fish in coastal waters. One could envisage, as well, going beyond existing constitutional mechanisms to allow adjustments by way of binding interprovincial agreements under a state contract procedure or

legislative delegation. Mechanisms such as these, however, would likely require their own constitutional amendments.

Delegation is a technique well known to constitutional lawyers. It has been clear since the *Nova Scotia Interdelegation Case*⁴⁵ that legislative powers as such, i.e., the power to enact legislation, may not be delegated or transferred from one level of government to the other. It has been equally clear since *P.E.I. Potato Marketing Board v. H.B. Willis Inc.*⁴⁶ that one level of government can authorize the other level to administer areas not under the latter's authority by delegating that administrative power through appropriate legislation. The procedure of administrative delegation is well known in fisheries; it has been commonly used with respect to the freshwater fisheries. Each province has its own, specific, federally enacted set of fisheries regulations. In the case of Ontario and all the provinces west of it, the non-tidal regulations specify a provincial minister or official as the individual administering the regulations. The regulations themselves are generally enacted in accordance with provincial requests.

While constitutional amendment appears to be a desirable outcome, there will be inevitable delays in implementation even if the will to change exists. In the meantime, and as a form of empirical study, the use of delegation offers a very attractive opportunity. There appears to be no reason why the federal government and the provinces could not experiment with different fisheries arrangements through a system of delegation. Considerable cooperation, effort and resources will be required to set up such a system; a medium-term commitment to continue provincially dictated policies and investments would be necessary. Like the 62-year delegation to Quebec of authority to administer the tidal fishery, however, any arrangement that proved unsatisfactory could be adjusted or changed before being constitutionally entrenched.

A constitution is not, and ought not to be, lightly amended. Proposed solutions must be well thought out and workable. The Constitution is not the place for tinkering and experimentation. On the other hand, it is not carved on stone tablets and ought to be changed when this can effect clearly needed reform. In my view, the call of the provinces for formal decision-making power in respect of fisheries should be heeded. The real social and economic impacts of fisheries decisions upon the provinces entitle them to control these aspects of fisheries as a local economic activity.

Notes

This study was completed in September 1984.

1. This point was made in the reports of both the Royal Commission on the Maritime and Quebec Fisheries in 1928 and the Task Force on Atlantic Fisheries (the Kirby Report) in 1982. The Royal Commission, as quoted in the Kirby Report at p. 49, stated:

The demands of the consumer must continue to dictate the form in which fish are marketed. Consumption always regulates sales, and sales regulate not only production but the particular form of the product.

The Kirby Report itself stated at p. 49:

The traditional production or volume orientation of fishermen, processors and governments has been slow to change toward a market-driven approach. This failure of attitude and orientation is a significant contributor to the fishery's current problems.

2. R.S.C. 1970, c. F-14 as amended.
3. R.S.C. 1970, c. T-7 as amended.
4. See, for example, the Kirby Report at pp. 49-55.
5. Bruce H. Wildsmith, *Aquaculture: The Legal Framework* (Toronto: Emond-Montgomery, 1982) at pp. 33-81 generally; Wildsmith, "Federal, Provincial and Municipal Government Roles in Aquaculture," paper prepared for the National Aquaculture Conference, St. Andrews, N.B., July 10-14, 1983; Wildsmith, *Federal Aquaculture Regulation*, Canadian Technical Report of Fisheries and Aquatic Sciences, No. 1252 (April 1984) at p. 3.
6. (1882), 6 S.C.R. 52.
7. *A.-G. Can. v. A.-G.s Ont., Que., N.S.*, [1898] A.C. 700.
8. *In Re Provincial Fisheries* (1896), 26 S.C.R. 444.
9. *A.-G. Can. v. A.-G. Que. (Quebec Fisheries Reference)*, [1921] 1 A.C. 413 at p. 428.
10. *A.-G. B.C. v. A.-G. Can. et al.*, [1914] A.C. 153 (P.C.).
11. *Supra*, note 9.
12. *A.-G. Can. v. A.-G. B.C. et al.*, [1930] A.C. 111 (P.C.).
13. (1981), 120 D.L.R. (3d) 699.
14. (1980), 32 N.R. 230.
15. (1980), 32 N.R. 541.
16. (1980), 115 D.L.R. (3d) 495.
17. (1969), 122 C.L.R. 177.
18. (1975), 135 C.L.R. 337.
19. (1976), 135 C.L.R. 507 (Aust. H.Ct.).
20. Personal communication, B.V. Lilburn, A/g First Assistant Secretary, Fisheries Division, Department of Primary Industry (Australia), September 3, 1984.
21. No. 86 of 1980.
22. Public Law No. 31, 67 Stat. c. 65.
23. (1960), 364 U.S. 502.
24. Public Law No. 94-265, 90 Stat. 331, codified at 16 U.S.C. para. 1801 *et seq.*
25. Apparently by virtue of "federal pre-emption" the federal authorities could assume jurisdiction over fisheries regulation from the coastline seaward, despite the grant of these resources in the coastal margin under the *Submerged Lands Act*. It is said that "[t]his could be done pursuant to the power of Congress over interstate commerce (the affectation doctrine) coupled with the concept of the public trust"; H. Gary Knight and James P. Lambert, *Legal Aspects of Limited Entry for Commercial Marine Fisheries*, study for N.M.F.S. prepared by Louisiana State University, Center for Wetland Resources, October 15, 1975, at p. 114.
26. Roland Finch, Director, Office of Fisheries Management, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, personal communication, June 27, 1984.

27. United States Congressional Record—Senate, June 13, 1984, s. 7168.
28. William G. Gordon. "Long Range Objectives in Management," paper prepared for *U.S. Fisheries Utilization and Management: Where Are We and Where Do We Go From Here?*, Eighth Annual Seminar of the Center for Oceans Law and Policy, University of Virginia, held at Cancun, Mexico, January 11–14, 1984.
29. *Ibid.*
30. Dennis J. Phelan. "Future Fisheries Policy," paper prepared for *U.S. Fisheries Utilization and Management*, *supra*, note 28.
31. Newfoundland Oceans Research and Development Corporation, "*It were well to live mainly off fish*": *The Place of the Northern Cod in Newfoundland's Development* (St. John's, 1981) at p. 82.
32. *Ibid.*, at p. 84.
33. Robin Churchill, "Revision of the EEC's Common Fisheries Policy — Part 1" (1980), 5 *European L. Rev.* 3 at p. 21.
34. *Ibid.*, at p. 22.
35. Robin Churchill, "EEC Fisheries: Agreement at Last" (1983), 7 *Marine Policy* 74.
36. *Ibid.*
37. Robin Churchill, "Fisheries: Scope of National Fishery Measures" (1982), 7 *European L. Rev.* 412 at p. 414.
38. S.G. Greene, Deputy Executive Director, Seafood Producers Association of Nova Scotia, personal communication, June 4, 1984.
39. S.N.S. 1983, c. 2.
40. *A.-G. Can. v. A.-G. Alta.*, [1916] 1 A.C. 588 (P.C.); *A.-G. Ont. v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.).
41. *Labatt Breweries of Canada Ltd. v. A.-G. Can.* (1979), 30 N.R. 496 (S.C.C.).
42. The same point is made elsewhere, for example, in Anthony Scott, and Philip A. Neher, eds., *The Public Regulation of Commercial Fisheries in Canada*, study prepared for the Economic Council of Canada (Ottawa: Minister of Supply and Services Canada, 1981) at pp. 41–44.
43. See, e.g., Michael Jenkin. *The Challenge of Diversity — Industrial Policy in the Canadian Federation*, study prepared for the Science Council of Canada (Ottawa: Minister of Supply and Services Canada, 1984); Alberta, *Harmony in Diversity: A New Federalism for Canada*, position Paper on Constitutional Change, October 1978.
44. It should be appreciated that the term "stock" is often applied where biological discreteness is uncertain. Thus it has been said that "'stock' is an abstract term applied to provide a rationale for a certain kind of aggregation of catch data . . . the operational term does not unequivocally refer to an identifiable physical entity. . . . The unit stock used in management is in many cases as much a function of past fishery practice as it is a function of fish biology. It follows as a consequence that if economic or social objectives call for a redefinition of fishery practice, biological assessment should generally be able to support it by a redefinition of unit stock which would not be an appreciably inferior index of the biological system on which the natural production depends." L.M. Dickie, "Perspectives on Fisheries Biology and Implications for Management" (1979), 36 *J. Fish. Res. Board Canada* 838.
45. *A.-G. N.S. v. A.-G. Can.*, [1951] S.C.R. 31.
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